

Articles

International Human Rights Law Challenges to the New International Criminal Court: The Search and Seizure Right to Privacy

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[T]he overriding interest must be that of the victims, and of the international community as a whole. . . . We have before us an opportunity to take a monumental step in the name of human rights and the rule of law [and] to create an institution that can save lives and serve as a bulwark against evil. We who have witnessed, time and again in this century, the worst crimes against humanity, have an opportunity to bequeath to the next century a powerful instrument of justice. So let us rise to this challenge. Let us give succeeding generations this gift of hope. They will not forgive us if we fail.

– United Nations Secretary-General Kofi Annan¹

The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!

– William Pitt (1763)²

I. INTRODUCTION

Late in the evening of Friday, July 17, 1998, at a United Nations facility in Rome, Italy, after five weeks of indefatigable, strained negotiations, 120 nations endorsed a treaty to establish a permanent International Criminal Court (ICC) to sit in the Hague, Netherlands with jurisdiction to try perpetrators of genocide, crimes against humanity, war crimes, and aggression.³ The Court will be established after sixty states have adhered to the Rome Statute,⁴ and will function fully after the Assembly of States Parties

1. *UN Secretary-General Declares Overriding Interest of International Criminal Court Conference Must Be That of Victims and World Community as a Whole*, U.N. Doc. L/ROM/6.r1 (June 15, 1998), <http://www.un.org/icc/pressrel/lrom6r1.htm> (last visited Apr. 18, 2001) [hereinafter *UN Secretary-General Declares*]; see also *Summary Record of the 1st Plenary Meeting, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, ¶¶ 11-12, U.N. Doc. A/Conf.183/SR.1 (1998).

2. HANSARD, PARLIAMENTARY HISTORY OF ENGLAND (1813), vol. 15, col. 1307, cited in *Miller v. United States*, 357 U.S. 301, 307 (1958). Though the English Parliamentarian Pitt decried the Crown's uninvited entry into the tattered homes of the poor, his words apply equally to rights of alleged perpetrators of barbaric crimes.

3. The Rome Statute for the International Criminal Court, July 17, 1998, U.N. Doc. A/Conf.183/9 [hereinafter *Rome Statute*], was concluded at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court [hereinafter *Rome Conference*], which was held in Rome from June 15-July 17, 1998. Unless otherwise specified, in this Article “ICC” refers to the International Criminal Court as an international organization, and “Court” refers to the judicial organ of the ICC functioning in its judicial capacity.

4. *Id.*, art. 126(1). The Rome Statute shall enter into force sixty days following the sixtieth

adopts collateral documents, including the ICC Rules of Procedure and Evidence and the ICC Elements of Crimes, finalized drafts of which were approved at the conclusion of the fifth session of the Preparatory Commission for the Establishment of an International Criminal Court.⁵

Though the Court will have jurisdiction to prosecute individuals charged with a limited number of serious international crimes and will have no jurisdiction to prosecute individuals for "ordinary" international human rights law violations,⁶ the Rome Statute expressly obligates the ICC to ensure extensive human rights safeguards for individuals before, during, and after trial.⁷ All aspects of all ICC proceedings, including every action taken by all ICC organs⁸ and divisions,⁹ and involving all ICC substantive and procedural

ratification, acceptance, approval or accession. As of May 2001, thirty-two States had adhered to the Rome Statute either by ratification or accession: Andorra, Argentina, Austria, Belgium, Belize, Botswana, Canada, Croatia, Dominica, Fiji, Finland, France, Gabon, Germany, Ghana, Iceland, Italy, Lesotho, Luxembourg, Mali, Marshall Islands, New Zealand, Norway, Paraguay, San Marino, Senegal, Sierra Leone, South Africa, Spain, Tajikistan, Trinidad and Tobago, and Venezuela. For a list of all States that participated in the Rome Conference, and the status of signatures, ratifications and accessions, see *infra* note 372.

5. A Preparatory Commission for the International Criminal Court [hereinafter Preparatory Commission] was called upon to prepare proposals for practical arrangements for "the establishment and coming into operation of the Court, including [preparing] draft texts of" the following documents related to the Court: the Rules of Procedure and Evidence; the Elements of Crimes; and the Rules of Procedure of the Assembly of States Parties. *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, Annex I, Res. F, U.N. Doc. A/Conf.183/10 (1998) [hereinafter Final Act]. A finalized draft Rules of Procedure and Evidence was approved by the Preparatory Commission on June 30, 2000, and published on July 12, 2000. *Report of the Preparatory Commission for the International Criminal Court—Addendum: Finalized Draft Text of the Rules of Procedure and Evidence*, U.N. Doc. PCNICC/2000/1/Add.1 (2000) [hereinafter Draft Rules of Procedure]. A finalized draft Elements of Crimes was approved on June 30, 2000, and published on July 6, 2000. *Report of the Preparatory Commission for the International Criminal Court—Addendum: Finalized Draft Text of the Elements of Crimes*, U.N. Doc. PCNICC/2000/1/Add.2 (2000) [hereinafter Draft Elements of Crimes]. The Assembly of States Parties is not obligated to adopt these particular finalized drafts but may "[c]onsider and adopt, as appropriate, recommendations of the Preparatory Commission." Rome Statute, *supra* note 3, art. 112(2)(a). The Preparatory Commission "shall remain in existence until the conclusion of the first meeting of the Assembly of States Parties." Final Act, *supra*, Res. F, para. 8 (emphasis in original).

In this Article, the term "collateral" or "ancillary" instruments or documents includes those listed in the Final Act, any other binding or non-binding instruments promulgated in accordance with the Rome Statute, and/or the Rome Statute itself. "States" or "States Parties" will refer to parties to the Rome Statute, unless otherwise indicated.

6. Rome Statute, *supra* note 3, article 5(1) provides that "[t]he jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole." "Ordinary" human rights violations were not considered to constitute serious crimes. For example, a Rome Conference Singaporean Delegate declared that "[r]ealism dictated that the aim should not be to establish a court of human rights of the kind that existed in Europe or the Americas . . . but, rather, to give tangible recognition to the fact that some acts were so universally abhorred that their perpetrators should not escape punishment." *Committee of the Whole, Summary Record of the 4th Plenary Meeting*, ¶ 5, U.N. Doc. A/Conf.183/SR.4 (1998); see also Darryl Robinson, *Defining "Crimes Against Humanity" at the Rome Conference*, 93 AM. J. INT'L. L. 43, 53 (1999) ("All delegations agreed that the [C]ourt's jurisdiction relates to serious violations of international criminal law, not international human rights law.").

7. See generally Kenneth S. Gallant, *Individual Human Rights in a New International Organization: The Rome Statute of the International Criminal Court*, in 3 INTERNATIONAL CRIMINAL LAW 693 (M. Cherif Bassiouni ed., 2d ed., 1999) (analyzing human rights generally under the Rome Statute).

8. There will be four ICC organs: (1) the Presidency; (2) an Appeals Division, Trial Division

law, must be “consistent with internationally recognized human rights,”¹⁰ and “be without any adverse distinction” on a broad range of discriminatory grounds.¹¹ These far-reaching human rights promises serve multiple purposes, not the least of which is to render the ICC a model for States Parties domestically.¹² Though these human rights pledges are grand, the Rome Statute falls short by failing to offer full human rights coverage to all persons affected by ICC prosecutions.

This Article argues that although the Rome Statute drafters¹³ excised express reference to the search and seizure right to privacy from the ICC treaty and collateral instruments, the right survives, and remains implicit therein. The search and seizure right to privacy is an “internationally recognized human right” under the Rome Statute’s article 21(3). It falls within the Court’s enumerated sources of applicable law. Though arrests of persons and other detentions are seizures, and therefore implicate privacy interests, those privacy interests will not be analyzed in this Article. This Article primarily focuses on searches and seizures related to places and things, including searches of persons.

To comply fully with its human rights mandate, the Court must respect the Rome Statute’s remedy of excluding tainted evidence¹⁴ in order to ensure

and a Pre-Trial Division; (3) the Office of the Prosecutor; and (4) the Registry. Rome Statute, *supra* note 3, art. 34.

9. This includes the Assembly of States Parties, which is a quasi-legislative body established by the Rome Statute. *Id.*, art. 112(1). Each State Party shall have one representative in the Assembly of States Parties. *Id.* Non-party States that have signed either the Rome Statute or the Final Act may be observers in the Assembly of States Parties. *Id.*

10. *Id.*, art. 21(3).

11. *Id.*

12. It is anticipated that the ICC will serve as “a model for the domestic administration of justice” and that the ICC will impact domestic law. Lawyers Committee for Human Rights, *Pre-Trial Rights in the Rules of Procedure and Evidence*, in 2 INTERNATIONAL CRIMINAL COURT BRIEFING SERIES, No. 3 (1999), at www.lchr.org/icc/papv2n3.htm (last visited Apr. 21, 2001) [hereinafter LCHR Briefing Paper on Pre-Trial Rights] (“States parties . . . that currently do not provide for any or some of the specified rights of suspects will be obliged to bring domestic law into conformity with the [Rome] Statute in order to implement Article 55.”).

13. The term “drafters” in this Article refers to Rome Conference delegates who negotiated the substantive terms of the Rome Statute and its collateral documents. The technical drafting of the Rome Statute was performed by twenty-five delegates seated on the Committee of the Whole Drafting Committee, chaired by Professor M. Cherif Bassiouni. After the delegates, via the Committee of the Whole, agreed to substantive provisions, those provisions were transferred to the Drafting Committee for technical drafting. The Drafting Committee had no competence to alter the substantive meaning of any provision referred to it for drafting. See *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Rules of Procedure for the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, U.N. Doc. A/Conf.183/2/Add.2 (1998), rule 49(2) (stating that the Drafting Committee “shall, without reopening substantive discussion on any matter, coordinate and refine the drafting of all texts referred to it, without altering their substance”). For a general discussion on the distinction between Rome Statute “drafters” and “framers,” see Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381 (2000) (discussing constitutional implications of distinction); cf. M. Cherif Bassiouni, *Negotiating the Treaty of Rome on the Establishment of an International Criminal Court*, 32 CORNELL INT’L L.J. 443, 452 n.36 (1999) (noting that Rule 49 “was relaxed during the third and fourth weeks [of the Rome Conference] when the working groups, eager to move on at a faster pace, became more reliant on the Drafting Committee to undertake more substantive drafting.”).

14. Rome Statute, *supra* note 3, art. 69(7).

that full human rights are afforded to all persons, including persons charged with the most heinous crimes. Through ensuring human rights to suspects and accused persons, the ICC can set an example to the world that the human rights of all—including suspects and the accused—are indeed sacred. As will be argued throughout this Article, ensuring human rights for all persons is fully consistent with the ideals promoted by the Rome Statute and is not likely to compromise justice, victims' rights, or any other Rome Statute goal.

Part II of this Article begins by examining the Rome Statute's apparent silence on critical human rights coverage and attempts to define the search and seizure right to privacy. It also explores the significance of the Rome Statute's omission of an express search and seizure privacy right and identifies problems caused by this absence. Part III briefly discusses twentieth-century efforts to establish an international criminal court and sets the contextual backdrop in which human rights provisions were incorporated into early drafts of the Rome Statute. Part IV examines the general human rights provisions contained in the ICC collateral instruments and introduces the Rome Statute, article 21(3) mandate that all ICC law be consistent with "internationally recognized human rights" and be without "adverse distinction" based on broad non-discrimination grounds. Part IV also discusses the international cooperation and judicial assistance provisions of the Rome Statute,¹⁵ which purport to provide for search and seizure privacy rights. Part V introduces the Vienna Convention's¹⁶ approaches to treaty interpretation, because they will be employed to help identify the existence and scope of the search and seizure privacy right in the Rome Statute. Part VI identifies and examines the Rome Statute's seven sources of applicable law,¹⁷ which the Court is to apply when resolving legal issues, including issues arising under international law of all varieties, including international criminal law and procedure, international humanitarian law, and international human rights law. This Part explores, for example, whether the right to privacy in the context of searches and seizures has risen to the level of customary international law and whether the right constitutes a general principle of law. Part VII concludes that although the drafters excised express reference to the search and seizure right to privacy from the treaty, the right survives, and remains implicit therein. This Part also concludes that the analytical framework developed in this Article can be used to ascertain the existence and scope of other rights that are expressly omitted from the Rome Statute.

15. International cooperation and judicial assistance provisions are contained in the Rome Statute, *supra* note 3, Part IX.

16. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

17. The sources of applicable law are contained in Rome Statute, *supra* note 3, art. 21.

II. GENERAL BACKGROUND

A. Human Rights Coverage—Broken Promises

Despite its extensive express commitment to human rights, the Rome Statute and other collateral instruments, at first glance, appear to be silent on certain critical human rights.¹⁸ Those instruments fail to provide expressly for the right to privacy generally¹⁹—and in particular in the context of searches and seizures.²⁰ They also fail expressly to cover various other trial and pre-trial rights.²¹ The absence of the express search and seizure right to privacy is

18. See, e.g., Christopher L. Blakesley, *Commentary on Parts 5 and 6 of the Zutphen Intersessional Draft: Investigation, Prosecution & Trial*, in OBSERVATIONS ON THE CONSOLIDATED ICC TEXT BEFORE THE FINAL SESSION OF THE PREPARATORY COMMITTEE (Leila Sadat Wexler ed., 1998) [hereinafter Blakesley, *Commentary*] (arguing that searches and seizures involving blood, body tissues, stomach pumps, and wire-taps need to be addressed in the Rome Statute); LCHR Briefing Paper on Pre-Trial Rights, *supra* note 12 (“[I]t is also clear that other internationally guaranteed pre-trial rights are missing from the text. [Critical rights] are, likewise, missing from the draft Rules of Procedure and Evidence submitted to the Preparatory Commission.”); Gallant, *supra* note 7 (arguing that the Rome Statute lacks privacy and other rights); Kenneth S. Gallant, *The Role and Powers of Defense Counsel in the Rome Statute of the International Criminal Court*, 34 INT’L LAW. 21, 21 (2000) (noting that the Court’s procedure is “strongly influenced by rights-based thinking . . . concerning individual protections . . . that comes from modern national constitutionalism and international human rights standards” but that ICC mechanisms for defense were lacking) (footnote omitted); see also Christopher L. Blakesley, Panel Discussion, *Association of American Law Schools Panel on the International Criminal Court*, 36 AM. CRIM. L. REV. 223, 236-37 (1999) [hereinafter Blakesley, *AALS Panel Discussion*] (identifying defense weaknesses under the Rome Statute, and contending that the treaty elaborates some defendants’ rights, “but actually often does so only by negative implication,” and that the Rome Statute’s “platitudinous statements” regarding rights are “often deficient and vague”).

19. Though the general right to privacy covers areas much broader than search and seizure (for example, certain sexuality and procreation rights), this Article uses “right to privacy” and “privacy rights” to refer narrowly to the right to privacy in the context of searches and seizures, particularly in instances in which evidence is sought or acquired for use in ICC proceedings. See *infra* Section II.B. This Article does not focus on privacy rights related to seizures of persons.

20. The sole express reference to privacy rights of suspects or the accused in the ICC collateral documents is in Draft Rules of Procedure, rule 73, *supra* note 5, at 37, which permit the Court to deem privileged certain communications between a person and their legal counsel, clergy, physician, or other professionals. Though rule 73 does not expressly address search and seizure privacy rights, it does demonstrate that the Draft Rules of Procedure are an appropriate instrument in which to incorporate the right, given the absence of the express right from the Rome Statute.

Delegations advocated elaboration of various provisions in a collateral treaty instrument. For example, the Holy See delegate suggested that “more specific language should be developed to protect such fundamental rights as . . . admissibility of evidence” in the Rules of Procedure. *Committee of the Whole, Summary Record of the 33d Meeting*, ¶ 39, U.N. Doc. A/Conf.183/C.1/SR.33 (1998). Likewise, the express search and seizure right to privacy could have been shifted to the Draft Rules of Procedure.

Other provisions that had been advocated for inclusion in the Rome Statute were relegated to a collateral treaty instrument. For example, the Syrian Arab Republic delegation proposed that the Rome Statute’s article 69 (concerning evidence admissibility) contain the following provision: “The Court shall respect and observe the obligations relating to the maintenance of confidentiality, showing due regard for national laws and customary practices such as the physician-patient, lawyer-client and confessor-penitent relationship, and shall respect and observe the confidentiality of private life.” *Proposal on Article 69, Paragraph 5, Submitted by the Syrian Arab Republic*, U.N. Doc. A/Conf.183/C.1/WGPM/L.22 (1998). The confidentiality point was relegated to the Rules of Procedure. Rome Statute, *supra* note 3, art. 69(5) (“The Court shall respect and observe privileges on confidentiality as provided for in the Rules of Procedure and Evidence.”); see also *Proposal Submitted by the Holy See [sic]*, U.N. Doc. A/Conf.183/11 (1998) (calling for privileges).

21. Rights that are arguably not expressly provided for include those provided for an accused at trial, but not expressly in place for all persons detained under ICC authority either by the Court or by

conspicuous, given that the right is well established in international law and is incorporated into a wealth of domestic and international human rights legal instruments and jurisprudence. This Article argues, for example, that the search and seizure right to privacy has become a part of the corpus of general international law, as it has risen to a customary international law norm and perhaps to the level of a general principle of law.²² The search and seizure right to privacy is incorporated into the constitutions or other domestic laws of virtually every nation that participated in the Rome Conference and that voted for, signed, and ratified the Rome Statute.²³ It is provided for in the Universal Declaration of Human Rights (UDHR),²⁴ which applies to all nations that participated in the Rome Conference, and in the International Covenant on Civil and Political Rights (ICCPR), which has been ratified by most nations.²⁵ The right is contained in the most widely ratified international human rights treaty—the Convention on the Rights of the Child—which has been adhered to by 191 states.²⁶ The right is also incorporated into the jurisprudence of the U.N. ad hoc criminal tribunals.²⁷ Significantly, although the right was expressly incorporated into early drafts of the Rome Statute, it was deleted from the Rome Statute for reasons which will be discussed below.²⁸

national authorities, for persons summoned to appear pursuant to Rome Statute, art. 58(7), or for persons provisionally arrested. According to the Lawyers Committee for Human Rights, they include the right to the presumption of innocence (not only at trial, but also pre-trial); the provision in full equality of rights under the Rome Statute, *supra* note 3, art. 55 (at all stages, not just during trial); prompt notice of reasons for arrest and of charges at the time of arrest (rather than prompt notice only upon questioning); similar rights related to the timing of notification of the right to counsel and to free legal assistance; access to counsel upon arrest; prompt access to the Court for all detainees; the right to challenge the lawfulness of detention; the right to access to and communication with the outside world; and rights related to specific time periods for trial within a reasonable time or release. LCHR Briefing Paper on Pre-Trial Rights, *supra* note 12. However, simply because rights are mentioned in Rome Statute, *supra* note 3, Part 6 (Trial) does not indicate that the Part 6 rights do not apply to other persons, who are not actually on trial, such as those under investigation. For example, Rome Statute, article 66, which appears in Part 6, provides generally that “[e]veryone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.” This provision could in theory be read broadly to include all persons, or it could be read narrowly to apply only to the accused at trial.

22. See discussion *infra* Subsection VI.C.5.b.

23. See discussion *infra* Subsection VI.C.5.c.

24. G.A. Res. 217A (III), art. 12, U.N. Doc. A/810 (1948) [hereinafter UDHR] (“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence.”). See discussion *infra* Subsection VI.C.5.

25. International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 17, 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force Mar. 23, 1976) [hereinafter ICCPR] (“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence.”). See discussion *infra* Subsection VI.C.5.c. The ICCPR has been adhered to by 147 of the approximately 190 nations eligible to adhere to that treaty. See *infra* note 315; see also <http://www.unhchr.ch/pdf/report.pdf> (last visited Apr. 21, 2001, updated Mar. 28, 2001) (listing U.N. human rights treaty ratifications).

26. Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1448, U.N. Doc. A/44/25 (1989) (entered into force Sept. 2, 1990), art. 16 [hereinafter Children’s Convention] (“No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence . . .”). See discussion *infra* Subsection VI.C.5.

27. See discussion *infra* Subsection VI.C.5.

28. See discussion *infra* Section IV.B.

B. *The Search and Seizure Right to Privacy*

Before examining the search and seizure right to privacy, it is necessary to understand the general "right to privacy." The "right to privacy" defies easy definition.²⁹ Generally, the right to privacy is based on notions of autonomy in decision-making about one's own self, actions, relations, and existence. The right to privacy concerns the degree to which a person is or is not "left alone," a person is mandated to or restricted from existing or interacting with or without others, or a person's identity, integrity (bodily, territorial, psychological, or other), autonomy, intimacy, sexuality, or emotions are interfered with against their desires.³⁰ Though some would argue that notions of privacy may be determined within the context of particular societies at particular points in time, and that the scope of privacy necessarily changes with societies' norms, values, and expectations,³¹ any such shifts would not negate the existence of the right to privacy.

The right to privacy in the context of searches and seizures, as developed in domestic and international arenas, in its simplest form, provides that all persons shall be free from unreasonable, arbitrary, or unlawful searches or seizures of their persons or effects. Common characteristics of the various definitions of the search and seizure privacy right include the following: a respect for the sanctity and inviolability of the home; some permissible limitations on the right; recognition that any interference with the right must be reasonable and limited to the scope necessary to satisfy a legal purpose; rejection of arbitrary and unlawful interference with privacy and unfettered discretion to search or seize; respect for human dignity, as privacy invasions can be degrading and can undermine public trust; effective external supervision of law enforcement authorities; balancing of law enforcement needs against the right to privacy; judicially independent authorization of searches and seizures; and legally enforceable safeguards regulating the use of police powers.³²

In the context of the ICC, privacy interests will be implicated when arguably unreasonable, arbitrary, or unlawful searches occur, irrespective of

29. E.g., J.B. YOUNG, *PRIVACY* 2 (J. B. Young ed., 1978) ("[P]rivacy, like an elephant, is perhaps more readily recognized than described."); Ronald J. Krotoszynski, *Autonomy, Community, and Traditions of Liberty: The Contrast of British and American Privacy Law*, 1990 DUKE L.J. 1398, 1401.

30. See generally Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989) (discussing the importance of privacy to human life); MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 287-99 (1993) (discussing the right to privacy); Global Internet Liberty Campaign, *Privacy and Human Rights: An International Survey of Privacy Laws and Practice*, available at <http://www.gilc.org/privacy/survey/intro.html> (last visited Apr. 19, 2001) (discussing various countries' privacy laws); Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (discussing the need for privacy rights).

31. See Krotoszynski, *supra* note 29, at 1401-02 (referring to privacy as "a realm of individual autonomy in recognized and accepted social contexts" that is "defined in relation to a particular society at a particular point in time").

32. See generally discussion *infra* Subsections VI.C.5-6 (customary international law and general principle of law discussion). The search and seizure privacy right is not only found within Anglo-American jurisprudence, but also is found in the law and practice of jurisdictions in all major legal systems of the world. See *id.*

whether they result in the seizure of incriminating evidence that the prosecutor seeks to introduce at trial. The search and seizure privacy right is a due process right, as the introduction of "tainted" evidence can act to deny a fair trial to an accused person. All persons, whether innocent or guilty, and irrespective of the nature or seriousness of the crime charged, are entitled to search and seizure privacy rights. The right should be safeguarded regardless of the gravity of the crime in question.

C. *Absence of an Express Search and Seizure Right to Privacy—So What?*

Should the international community be concerned about the privacy interests of alleged perpetrators of heinous crimes such as genocide, war crimes, or crimes against humanity? Should U.N. troops, national police, governmental agents, or civilian vigilantes be prohibited from ignoring the privacy interests of suspects or accused persons in the name of promoting justice? After all, some would argue, the crimes are unspeakable, and the perpetrators despised and deserving of the most severe punishment. This Article presumes that the answer to these questions is yes.

The omission of the express right to privacy from the Rome Statute and its ancillary instruments is of concern because suspects or accused persons³³ are potentially subject to conviction based on evidence obtained through unlawful, arbitrary or unreasonable searches and seizures with no express remedy, in the perceived greater interest of promoting justice and eradicating impunity for heinous crimes.³⁴ The failure to incorporate expressly the right in

33. The drafters of the Rome Statute rejected use of the term "suspect" and sought to replace it with the awkward phrase "person in respect of whom there are grounds to believe that he or she has committed a crime," which the framers believed was "a formulation which would be clearer for the various legal systems which would have to interpret the [Rome] Statute." *Committee of the Whole, Summary Record of the 17th Meeting*, ¶ 4, U.N. Doc. A/Conf. 183/C.1/SR.17 (1998). This Article will use the term "suspect" in lieu of the more awkward phrase, and will use the term "accused" to refer to a person who has been charged with a crime.

34. This balancing of interests has been incorporated into the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), which were established to try persons for perpetrating international crimes in the Former Yugoslavia and Rwanda, respectively. The Statute of the International Criminal Tribunal for the Former Yugoslavia can be found at S.C. Res. 827, U.N. SCOR, 48th Sess., Annex, U.N. Doc. S/RES/827/Annex (1993) [hereinafter ICTY Statute], and the Statute of the International Criminal Tribunal for Rwanda at S.C. Res. 955, U.N. SCOR, Annex, U.N. Doc. S/RES/955 (1994) [hereinafter ICTR Statute]. The ICTY has explained that because of the gravity of crimes charged, evidentiary rules in international criminal tribunals are traditionally applied more laxly than in domestic fora and are skewed to disfavor the accused. *See, e.g.*, *Prosecutor v. Tadic*, Case No. IT-94-1, 7 CRIM. L.F. 1, 139 (1996). The ICTY discusses the "elastic rules of evidence permissible" before such international criminal tribunals. *Id.*, ¶ 28 (An "example of the more elastic rules of evidence permissible before those courts, which have tried war criminals, is found in the greater frequency with which hearsay evidence is admitted, when compared to proceedings before most Courts dealing with offences purely under national law.") (citation omitted).

The balancing of interests in the search and seizure privacy right context was also applied in the high profile Scottish "Lockerbie Bombing Trial," in which one of two defendants was convicted on charges related to the 1988 bombing of Pan Am flight 103 over Lockerbie, Scotland. *See Her Majesty's Advocate v. al-Megrahi*, J.C. Case No. 1475/99 (2001). One of the defendants, Al Amin Khalifa Fhimah (Mr. Fimah), had set up a travel firm in Malta with another businessman named Vincent Vassallo. In 1991, Scottish and Maltese police and a U.S. agent from the Federal Bureau of Investigation (FBI)

these documents is of particular concern, given the developing mindset that though human rights for suspects and accused persons may be important, suspension of the right is permitted in the interests of society, the victims, law enforcement and prosecutorial needs, and politics. Furthermore, increased deviation from enforcement is likely, as authorities have renewed their fervor to apprehend suspects and hail them before international tribunals, such as the International Criminal Tribunal for the Former Yugoslavia (ICTY).³⁵

The international community should be concerned because the rights of society as a whole, and the rights of law abiders, are threatened when the system impinges on the rights of suspects and accused persons, who may indeed be law abiders.³⁶ The search and seizure privacy right is indeed a right, and as such, it is to be enjoyed equally by all persons. This right guards not only the privacy of ordinary, law-abiding citizens but also the privacy of criminals or suspected criminals, even those suspected of genocide, crimes against humanity, or war crimes. As the Constitutional Court of South Africa noted in speaking about the new South African constitution:

[T]he Constitution is not a set of high-minded values designed to protect criminals from their just desserts; but is in fact a shield which protects all citizens from official abuse. They must understand that for the Courts to tolerate the invasion of the rights of even the most heinous criminal would diminish [the citizens'] constitutional rights.³⁷

Respecting the human rights of alleged criminals will not hinder the fight against impunity. First, even if the Court applies the exclusionary rule

visited the travel agency. At the agency that day, Mr. Vassallo allegedly consented to a search that led to the seizure of Mr. Fhimah's diary from Fhimah's agency desk. The diary contained evidence that could be construed as implicating Mr. Fhimah on the charges for which he was tried. In fact, the "principal piece of evidence against [Mr. Fhimah came] from two entries in [the seized] diary." *Id.*, ¶ 84. Mr. Fhimah, in defense, sought to have the diary excluded as evidence against him at trial, on the grounds that the diary was seized pursuant to an unlawful search.

The Scottish court ruled that although Maltese law had probably been violated in the warrantless search and seizure, the evidence could nevertheless be admitted against Mr. Fhimah. The court noted that "[I]n all these circumstances it appears to us that such irregularity as occurred can properly be regarded as excusable. It is further significant that this is of course a murder case . . . and in such a case the public interest in the prosecution of a criminal has to be given due weight." *Fhimah's Diary Admissible* [sic], *Rules Court*, REUTERS, Oct. 6, 2001 (quoting Lord Sutherland, presiding judge), at <http://www.geocities.com/CapitolHill/5260/week23.html> (last visited May 7, 2001); Donald G. McNeil, Jr., *Defendant's Diary Is Admitted as Evidence in Lockerbie Trial*, N.Y. TIMES, Oct. 6, 2000, at A9.

35. See Holger Jensen, *War Crime Laws Being Prosecuted Too Slowly, Too Selectively*, in SCRIPPS HOWARD N. SERV., Apr. 5, 2000 (raising questions about the work of the ICTY); James Kitfield, *Humanity's Court*, THE NAT'L J., May 13, 2000, at 1508 (discussing the work of the ICTY); Colin McMahon, *Serbs Leaving, NATO Ready To Enter Kosovo—Security Council Approves Peace Pact—Clinton: No Aid Until Milosevic Out*, CHI. TRIB., June 11, 1999, at 1 (discussing British Special Air Service "SAS" troops successfully detaining a dozen suspects); Tim Ripley, *War Crimes Tribunal To Issue More Indictments*, in JANE'S INTELLIGENCE REV., June 1, 2000, vol. 12, No. 6 (focusing on recent indictments handed down by the ICTY); Chuck Sudetic, *The Reluctant Gendarme—Why is France protecting indicted war criminals in the sector of Bosnia it controls?*, ATLANTIC MONTHLY, Apr. 1, 2000, at 91 (criticizing the failure of France to arrest indicted war criminals residing in the French controlled sector of Bosnia-Herzegovina).

36. The Rome Statute provides: "Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law." Rome Statute, *supra* note 3, art. 66(1). Thus, suspects and the accused are deemed to be law abiders until convicted.

37. S. v. Nombewu, 1996(12) BCLR 1635, 1661(E)(SA).

liberally and suppresses large quantities of improperly seized evidence, it is unlikely that prosecutorial or societal interests would be compromised by, for example, the dismissal of prosecutions. Even if particular evidence were suppressed, it is likely that overwhelming other evidence will exist to support a conviction.

Second, affording suspects and accused persons full rights is consistent with eradicating impunity and with full human rights for all, and will ultimately impact society positively. Respecting rights of suspects and the accused will educate officials and the public about the sanctity of human rights, and will encourage human rights compliance. Human rights education at the international level will likely trickle down to the grassroots. As governments and citizens become more aware of the need to enforce these rights, fewer human rights violations will occur.

D. *Privacy Right Breaches*

1. *The General Problem*

The omission of express search and seizure privacy rights from the Rome Statute and its collateral instruments will undoubtedly present the Court in its early days with many difficult issues. Are prohibitions against unlawful, unreasonable, and arbitrary searches and seizures implicitly incorporated into the Rome Statute and its collateral instruments? If so, what is the scope of such coverage? Do lawful searches and seizures require prior judicial authorization? If so, what level of cause or justification is sufficient to support such authorization? Does the right apply only when a search or seizure is conducted by an arm of the ICC, or does it apply when conducted by a state acting on its own volition or acting at the behest of the Court (particularly if domestic privacy law does not accord with international law)?³⁸ Is the search

38. Such questions are called to mind by the recent globally publicized police action involving the taking into custody of former Yugoslav President Slobodan Milosevic, the search of his housing compound, and the seizure of possibly incriminating items from his home. In March 2001, local Serbian police arrived at Milosevic's Belgrade compound to execute a Serbian warrant for his arrest on charges of abuse of power, financial misdealings, and corruption. Following a lengthy confrontation at his cordoned-off home, protracted negotiations over the terms of his surrender to authorities, and a police assault on the compound, he was taken into custody. See Steven Erlanger, *Serb Authorities Arrest Milosevic to End Standoff*, N.Y. TIMES, Apr. 1, 2001, at A1; see also Alexandra Niksic, *Milosevic To Be Grilled, Judge To Decide on His Detention*, AGENCE FRANCE PRESSE, Apr. 1, 2001 (quoting Milosevic's lawyer, Toma Fila, who contended that "the former president 'was not arrested' but had voluntarily surrendered to justice officials" and quoting Ivica Dacic, who contended that Milosevic had only "answered a summons to take part in the investigative procedure").

The police searched Milosevic's house and allegedly uncovered numerous items, including machine guns, automatic rifles, pistols, two crates of hand grenades, a rocket-propelled grenade launcher, ammunition, and "plans containing details for an uprising in April." *Yugoslav Ex-President Milosevic Arrested by Serbian Authorities*, Apr. 1, 2001, LEXIS, Nexis Library, Facts on File (quoting "an interior ministry source"); Stefan Racin, *Arms, Coup Plans Found in Milosevic Villa*, UPI, Apr. 1, 2001, LEXIS, Nexis Library, UPI File.

Although a principal issue immediately raised was the seizure of Milosevic's person so that he could stand trial in Belgrade on corruption charges, issues related to the search and seizure right to

and seizure privacy right standard applied uniformly, irrespective of who or what entity conducts the search and seizure, and under what circumstances? If evidence is seized by a state and sought to be used in an ICC prosecution, does it matter if the evidence would ordinarily be admissible in the national court but not ordinarily admissible in an ICC proceeding? Does it apply when the search or seizure is conducted by an inter-governmental security organization, such as the North Atlantic Treaty Organization (NATO)? Does the search and seizure privacy right apply when authorities seek to inspect private facilities to verify weapons destruction, irrespective of whether the search was conducted in compliance with the provisions of a relevant arms reduction treaty, such as the Chemical Weapons Convention?³⁹ Does it apply when the search or seizure is conducted by private vigilantes, and the prosecutor seeks to use the seized evidence at trial? If either of two states and/or the Court has jurisdiction over a situation, and the search and seizure privacy safeguards vary among the jurisdictions, will authorities forum shop and push for the trial to be held in the jurisdiction with the most pro-prosecution search and seizure privacy laws? Does the right cover only targets of investigations against whom incriminating evidence is obtained in violation of the right, or does it cover non-targets whose personal rights might not have been violated by the incursion but who are implicated by the seized evidence? Does it apply to innocent parties victimized by violative searches and seizures, who may never be charged with a crime? Finally, if the search and seizure privacy right has been breached and evidence obtained, will that evidence be suppressed under the "mandatory" exclusion provision of the Rome Statute, article 69(7)?⁴⁰

In a world where notions of privacy may be regularly challenged by advances in science and technology and shifts in societal and individual

privacy might also be presented. For example, though the Yugoslav government agents had a local arrest warrant for Milosevic, did they have, or indeed did they need under local law, a warrant to seize any evidence found within his home? Could any incriminating evidence found within his home during the arrest be used against Milosevic in his domestic trial in Serbia? Could that evidence be transferred for use in his prosecution by the ICTY, that had already issued an international arrest warrant for him and that might seek to try him, using that evidence, for international crimes?

39. The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Jan. 13, 1993, 32 I.L.M. 800 (entered into force Apr. 29, 1997) [hereinafter CWC]. The CWC, which is designed to eradicate certain weapons of mass destruction and assure their continued absence, has in place a comprehensive regulatory regime which includes inspecting private and governmental sites in the territories of parties to the treaty. See BARRY KELLMAN & EDWARD A. TANZMAN, *MANUAL FOR NATIONAL IMPLEMENTATION OF THE CHEMICAL WEAPONS CONVENTION* i, 102 (1998). Arguably the CWC curtails search and seizure privacy rights in the parties' domestic jurisdictions. However, the CWC does not undermine the existence of the search and seizure privacy right, and the CWC inspection and verification provisions should be construed as being in accord with the right. See *id.* at 102 ("The CWC is the first multilateral weapons control agreement that requires widescale inspection of privately-owned sites and thus is the first agreement demanding that attention be paid to the legal rights of those sites' owners and personnel.") The CWC regime seeks to harmonize chemical weapons inspections with privacy and other rights of citizens. *Id.* at 109 ("CWC inspections at chemical facilities introduce an additional level of government intrusion . . . which could impinge on rights of privacy. The right to privacy is universally acknowledged. Virtually every nation's laws explicitly protect the right to privacy by constitutional expression, through statutory provisions, or judge-made law."). See generally *id.* at 102-30 (discussing this topic in greater depth).

40. For a discussion of the Rome Statute, article 69(7) exclusionary rule, see *infra* Part II.B.3.

expectations regarding privacy interests, search and seizure privacy issues, such as those above, will pose particular challenges to the Court. Countless first-impression search and seizure privacy issues will arise. For example, an ICC suspect might be apprehended by a State party, which, without prior judicial authorization, extracts a DNA sample from the suspect (for example, to prove that the suspect was the father of a child born as the result of a forced pregnancy),⁴¹ in a manner that might or might not be consistent with that State's own laws or with international human rights law, such as that contained in the ICCPR. Another possibility is that an organization such as NATO might engage in satellite imaging to discover incriminating data, or, electronic mail messages, satellite telephone or other high tech communications⁴² might be intercepted and introduced against the accused at trial. Or, a country such as the United States might gather incriminating evidence using reconnaissance plane flights, like those that it routinely flies along the coast of China.⁴³ In these scenarios, we ask whether the search and seizure right to privacy would prevent accused persons from having this arguably unlawfully acquired evidence used against them at trial, or whether another remedy short of exclusion might be afforded.

2. *The Problem Illustrated*

Issues related to breach of the search and seizure privacy right can arise in a number of factual situations in prospective ICC proceedings involving a range of individuals, from rights violators,⁴⁴ to victims,⁴⁵ to innocent third parties.

41. Crimes against humanity and war crimes prohibit forced pregnancy, which is defined as the "unlawful confinement, of a women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law." Rome Statute, *supra* note 3, arts. 7(2)(f), 8(2)(b)(xxii), 8(2)(e)(vi). See also Blakesley, *Commentary, supra* note 18, at 88-89 (arguing that searches and seizures involving blood, body tissues, stomach pumps, and wire-taps need to be addressed in the Rome Statute); Blakesley, *AALS Panel Discussion, supra* note 18.

42. Domestic courts and legislative bodies routinely are finding that individuals' expectations of privacy are diminishing, which arguably justifies greater intrusion by the government into what had been considered private. For example, the United States government has conducted surveillance using "Carnivore," a program that can monitor all e-mail on a network of an internet service provider. See, e.g., Johnny Gilman, *Carnivore: The Uneasy Relationship Between the Fourth Amendment and Electronic Surveillance of Internet Communications*, 9 COM. L. CONSPECTUS 111 (2001) (arguing that Carnivore threatens to exceed the bounds of permissible surveillance of private internet communication). Whereas strict and specific rules govern telephone wiretaps and other more traditional means of electronic surveillance, there are no clear guidelines regarding internet surveillance. See David Stout, *Technology Briefing: Software; Pledge on Software Review*, N.Y. TIMES, Aug. 10, 2000, at C4. But see United States Telecom Ass'n v. FCC, 227 F.3d 450 (D.C. Cir. 2000) (striking down government order that broadly expanded the ability of law enforcement agents to monitor cell phone conversations of criminal suspects).

43. See, e.g., Michael R. Gordon, *Collision with China: Military Analysis—"A Dangerous Game"*, N.Y. TIMES, Apr. 3, 2001, at A1 (describing U.S. military planes running reconnaissance operations to monitor radar signals, electronic communications and the activities of Chinese shore-based units and ships); Thom Shanker, *U.S. Resumes Its Spy Flights Close to China*, N.Y. TIMES, May 8, 2001, at A1 (describing the resumption of U.S. spy plane flights after the crash between a U.S. and a Chinese plane).

44. Individuals and entities who might potentially impinge upon privacy in the context of searches and seizures related to ICC prosecutions could, theoretically, include: (1) a national police or

In a "typical" scenario that might arise in the ICC framework, the ICC prosecutor may suspect that "Mr. A," currently living in a Vienna apartment, had command responsibility of the armed forces of a neighboring country, and being in that position, was responsible for crimes against humanity.⁴⁶ Pursuant to the Rome Statute and Rules of Procedure, the ICC Prosecutor requests that Austrian authorities search Mr. A's apartment and seize evidence. Austrian authorities issue a search warrant, and local government agents search the apartment in a manner inconsistent with Austrian law. The authorities seize incriminating documents which the Prosecutor seeks to introduce at trial. Mr. A objects, pursuant to Rome Statute, article 69(7), and moves for exclusion of the documentary evidence on grounds that the search violated Mr. A's "internationally recognized human right" to privacy because the search and seizure violated Austrian law, the Rome Statute, and/or international human rights law. The prosecution concedes that Austrian law was violated, but argues that the evidence should be admitted as the breach was not severe and did not affect the reliability of the evidence; that the Court is not empowered to rule on the validity *vel non* of Austrian law; and that there is no search and seizure privacy "internationally recognized human right" under the Rome Statute.

3. *Exclusion of Evidence: A Remedy for Privacy Breaches*

Full enforcement of the Rome Statute search and seizure privacy right depends to some degree on article 69(7) of the treaty, which provides for a two-part "mandatory" exclusionary rule.⁴⁷ If either prong of that exclusionary

other governmental authority; (2) a law enforcement arm of the ICC (including the Prosecutor or a judge who may request a warrant); (3) civilians; (4) an inter-governmental organization (such as NATO); or (5) a combination of the above.

45. The broad range of search and seizure victims might include: (1) suspects pre-charge; (2) suspects post-charge (accused); (3) suspects or others who are never charged; (4) non-suspects who become suspects, who may be charged only after evidence incriminating them was obtained through an unlawful search; or (5) non-suspect, third party bona fides who suffer property or other harm resulting from a privacy invasion. Though the list of prospective victims is lengthy, this Article focuses only on the accused implicated by evidence obtained through a questionable search and seizure.

46. This hypothetical draws upon the facts of *Prosecutor v. Mucic*, Case No. IT-96-21, Decision on the Tendering of Prosecution Exhibits 104-108 (Trial Chamber, Nov. 16, 1998; Feb. 9, 1998), that was prosecuted in the International Criminal Tribunal for the Former Yugoslavia. Search and seizure privacy rights issues were also raised in the International Criminal Tribunal case of *Prosecutor v. Bicamumpaka*, Case Nos. ICTR-99-49-DP, ICTR-99-50-I (1999) (relevance of search and seizure privacy right when Cameroonian officials seized documents from arrested Rwandan official). See discussion *infra* at Subsection VI.C.5 (discussing ICTY and ICTR exclusionary rule cases); see also *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T (1996), Decision on the Preliminary Motion Submitted by the Defence on the Form of the Indictment and Exclusion of Evidence (issue raised of "exclusion of evidence obtained from the Accused or having belonged to him"). This Article offers a framework for the Court to use in analyzing issues such as those currently before the ICTY and the ICTR.

47. Rome Statute, *supra* note 3, article 69(7) provides:

Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:

- (a) The violation casts substantial doubt on the reliability of the evidence; or
- (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

rule is satisfied, evidence acquired through violations of the privacy right, as an "internationally recognized human right," may be excluded from use against the accused at trial.⁴⁸ If the prosecutor seeks to use at trial evidence obtained during a questionable search or seizure, the accused may petition the Court, which has broad power over the nature and scope of evidence admitted at trial,⁴⁹ to exclude the evidence or grant another appropriate remedy.

The ICC's exclusionary rule is not *sui generis*, but in effect mimics similar rules that exist throughout many domestic and international legal systems. For example, exclusionary rules are expressly incorporated into various national Constitutions⁵⁰ and appear elsewhere within the general and criminal laws of other countries.⁵¹ International tribunals, such as the

48. Despite the article 69(7) exclusionary rule, tainted evidence might still be admitted against the accused, as the article 69(7) exclusionary rule is inherently precatory. The term "internationally recognized human rights" is not defined in the Rome Statute, and the search and seizure right to privacy is not expressly categorized as an "internationally recognized human right." See Rome Statute, *supra* note 3, art. 69(7). For an analysis of Rome Statute, *supra* note 3, article 69(7), see Gallant, *supra* note 7, at 718-20. This Article will not comprehensively discuss the Rome Statute article 69(7) exclusionary rule.

49. Rome Statute, *supra* note 3, art. 69; Draft Rules of Procedure, *supra* note 5, at Rule 63.

50. Examples of constitutions that contain express exclusionary rules for evidence obtained in violation of rights include the South African Constitution, which in section 35(5) provides that "[e]vidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice." See *S. v. Naidoo*, 1998 (1) BCLR 46 (SA) (applying South African Constitution, § 35(5) exclusionary rule); see also *S. v. Nombewu*, 1996 (12) BCLR 1635, 1661 (SA) (finding that the presence or absence of prejudice to the accused, and the nature and degree thereof, impacted on the question of whether to exclude evidence in the interests of ensuring a fair trial); *S. v. Shongwe and Others*, 1998 (9) BCLR 1170(T) (finding that exclusion not absolute). The Constitution of Paraguay, article 36 provides "Evidence obtained in violation of the [provisions related to inviolability of personal documents and privacy correspondence] is not admissible in court." PARA. CONST. tit. II, ch. II, art. 36. The Constitution of Peru provides that "Private documents obtained in violation of [the provision related to inviolability of communications and private documents] have no legal effect." PERU CONST. tit. I, ch. I, art. 2(g).

51. For Australia's exclusionary rule, see *Ridgeway v. R.* 129 A.L.R. 41 (1995) (discussing exclusion of evidence illegally procured, and determining whether the exclusion would undermine judicial integrity) and *Bunning v. Cross*, 141 C.L.R. 54 (1978) (discussing exercising discretion to exclude evidence because of the circumstances or manner in which it was obtained or came into existence). For the exclusionary rule in Trinidad and Tobago, see *Mohammed v. State*, Privy Council, [1999] 2 AC 111, [1999] 2 WLR 552 (finding that constitutional rights violation is cogent factor in favor of exclusion). For a discussion of the Scottish exclusionary rule, see *Her Majesty's Advocate v. al-Megrahi*, J.C. Case No. 1475/99 (2001) (balancing interests when deciding whether to exclude evidence, and considering the gravity of the offense). In Hong Kong, the exclusionary rule is discussed in *R v. Yu Yem-kin*, 4 HKPLR 75, 81-104, 104 (1993) (discussing exclusionary rule but ruling that admission of evidence in the instant case "would not be unfair or unjust"). For a discussion of the exclusionary rule in Japan, see Kuk Cho, *The Japanese "Prosecutorial Justice" and its Limited Exclusionary Rule*, 12 COLUM. J. ASIAN L. 39, 62 (1998) (noting that the exclusionary rule in Japan was accepted in 1978 in the case of *Japan v. Hashimoto*). All illegally obtained evidence is not excluded in some jurisdictions. For example, one commentator has noted that "the great bulk of the American exclusionary rules in the search and seizure area . . . has been rejected in the Italian model," and that "[e]vidence obtained by way of an illegal search or as a by-product of an illegal interception [is] admissible in the Italian court." Elisabetta Grande, *Italian Criminal Justice: Borrowing and Resistance*, 48 AM. J. COMP. L. 227, 249 (2000) (also noting that extrinsic exclusionary rules, that make evidence inadmissible for reasons extraneous to truth-finding considerations, are present in the Italian system, and include testimonial privileges and rules excluding documents illegally seized or excluding illegally performed interceptions of otherwise private communications).

International Criminal Tribunal for the Former Yugoslavia (ICTY)⁵² and the International Criminal Tribunal for Rwanda (ICTR),⁵³ have exclusionary provisions built into their rules.

The Rome Statute exclusionary rule,⁵⁴ like the exclusionary rules found in the other legal systems, helps ensure that the privacy interests of suspects are upheld, as the Court balances competing victims interests' versus suspects' and accused persons' interests, discourages human rights violations in evidence-gathering, maintains the Court's integrity and legitimacy, and furthers the Court's goals of educating the global population on criminal justice issues⁵⁵ and setting an example for States to follow in their national criminal justice systems. If the Court follows the jurisprudence of the ad hoc international criminal tribunals and applies the exclusionary rule in a relaxed manner,⁵⁶ the rights of accused persons may be compromised, despite article 69(2)'s mandatory language, and even though the rule does not authorize the Court to consider the nature or severity of the human rights violation, only that the two-part test be met.⁵⁷

E. Summary Conclusion

Though express reference to the right to privacy in the search and seizure context was excised from the Rome Statute during the final days of the Rome Conference, the right remains implicit within the treaty. The right is an "internationally recognized human right" because it falls within the sources of applicable law contained in Rome Statute, article 21. Thus, pursuant to article 21(3), the Court must enforce it in all of the Court's operations and proceedings.⁵⁸ All law applied and interpreted by the Court must be consistent

52. The ICTY exclusionary rule provides: "No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings." *Rules of Procedure and Evidence as Amended 30 January 1995*, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, 5th Sess., U.N. Doc. IT/32/Rev.3/Corr.1 (1995).

53. The ICTR Rules contain an exclusionary rule identical to that contained in the ICTY Rules. *Rules of Procedure and Evidence as Amended*, International Criminal Tribunal for Rwanda, rule 95, U.N. Doc. ITR/3/REV.1 (1995).

54. The exclusionary rule is not the only remedy theoretically available to accused persons who are victims of unlawful searches and seizures. Remedies in some jurisdictions could include civil tort remedies against the offending governmental agents or private individuals; criminal prosecution of the offending government agent or private individual; governmental sanctions of offending governmental agents; and internal discipline within police departments for offending officers. A discussion of remedies, other than exclusion, that the Court might provide under the Rome Statute is beyond the scope of this Article.

55. The Court can be a global educator. As the Court functions, in accordance with the Rome Statute and consistently with "internationally recognized human rights," the Court educates the global citizenry on what constitutes internationally accepted behavior not only of individuals, but also of governments, who will learn international fair trial and criminal investigation standards.

56. E.g., *Prosecutor v. Mucic*, Case No. IT-96-21, Decision on the Tendering of Prosecution Exhibits 104-108 (Trial Chamber, Nov. 16, 1998; Feb. 9, 1998).

57. Rome Statute, *supra* note 3, art. 69(7).

58. A comprehensive discussion of derogation from compliance with rights under the ICC is beyond the scope of this Article. For a discussion on the impermissibility of derogation from rights in international law, see Sara Stapleton, *Ensuring a Fair Trial in the International Criminal Court*:

with the search and seizure privacy right. However, the mere existence of the search and seizure right to privacy does not adequately ensure the realization of the right of a suspect or of an accused person. The Court must fully enforce the right, just as it is required to enforce all other internationally recognized human rights, irrespective of whether the particular right in question is expressly mentioned in the Rome Statute or its collateral instruments.

Though the Court will likely find that the Rome Statute incorporates the search and seizure right to privacy, the scope of coverage remains uncertain, and must be developed by the Court, taking into account various factors, possibly including shifting privacy expectations. When the Court faces a human rights challenge in areas where the Rome Statute might be silent, such as environmental rights, sexuality rights, gender rights, and bona fide third party rights, along with other apparently missing fair trial rights, the Court will likely undertake the analysis proposed in this Article.⁵⁹ The determination of the search and seizure right to privacy in the ICC framework may pave the way for challengers to prevail on claims that other human rights not expressly included are implicit therein and must be enforced. This article proposes a framework for the Court to apply as it explores the expansive human rights coverage of the Rome Statute.

III. THE ROME STATUTE

A. *The Rome Statute: Pre-Rome Conference*

Adoption of the Rome Statute was the culmination of almost a century of governmental, non-governmental organization (NGO), inter-governmental organization (IGO), and individual perseverance to establish a permanent international criminal tribunal to wrest away the power of systemic impunity and bring to justice perpetrators of the most heinous international crimes. Although the early efforts of the League of Nations, the United Nations, and others failed to create a permanent criminal tribunal, the Rome Statute

Statutory Interpretation and the Impermissibility of Derogation, 31 N.Y.U. J. INT'L L. & POL. 535 (1999) (arguing that derogation is not permitted under the Rome Statute and criticizing derogation from fair trial norms).

59. The purportedly "missing" rights might become issues in ICC prosecutions in various ways. For example, the issue of sexual orientation might arise if the Court seeks to prosecute a person who allegedly perpetrated crimes against humanity by persecuting persons because of their sexual orientation. The accused might argue that because sexual minorities are not an "identifiable group or collectivity" under the Rome Statute's article 7(1)(h) or under that article's corresponding Elements of Crimes, the prosecution must fail. The Court, if faced with such an argument, would likely analyze whether sexual minorities would be deemed an "identifiable group or collectivity" under article 7(1)(h), and would also likely consider that question bearing in mind that article 7(1)(h) must be applied and interpreted, pursuant to article 21(3), in a manner that "must be consistent with internationally recognized human rights, and be without any adverse distinction founded on" various factors. Rome Statute, *supra* note 3, arts. 7(1)(h), 21(3). As the right to be free from discrimination based on sexual orientation is a norm of customary international law, *see* discussion *infra* note 292, and because customary international law falls within the sources of law to be applied by the Court, *see* discussion *infra* Subsection VI.C.5, it is likely that the Court would sustain a crimes against humanity prosecution rooted in persecution based on sexual orientation.

borrows wisdom from the preparatory studies, reports, draft conventions and other preparatory work of those bodies.⁶⁰

On December 9, 1948, just one day before the promulgation of the Universal Declaration on Human Rights (UDHR), the U.N. General Assembly adopted a resolution recognizing the increasing need for an international criminal tribunal,⁶¹ and a process began leading to the 1951 and 1953 drafts⁶² of a statute for an international court with permanent criminal jurisdiction.⁶³ No tribunal was created to prosecute genocide or apartheid, though conventions on each subject called for such a tribunal.⁶⁴ However, in 1981, Professor M. Cherif Bassiouni, under commission by the U.N. ad hoc Committee for Southern Africa, published a draft statute to prosecute individuals for the crime of apartheid.⁶⁵ In 1989, Trinidad and Tobago, in the context of meetings related to drug trafficking, led a renewed U.N. effort for the creation of an international criminal court,⁶⁶ joined by Professor Bassiouni who prepared yet another draft statute,⁶⁷ which was followed by various

60. For excellent, comprehensive summaries of the failed attempts to establish a tribunal with international criminal jurisdiction, see *THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY* 3-19 (M. Cherif Bassiouni ed., 1998); see also 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, *AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 11-15 (1995); Michael Scharf, *The Jury is Still Out on the Need for an International Criminal Court*, 1 DUKE J. COMP. & INT'L L. 135, 139-40 (1991); Leila Sadat Wexler, *The Proposed Permanent International Criminal Court: An Appraisal*, 29 CORNELL INT'L L.J. 665, 669-83 (1996).

61. G.A. Res. 260B(III), U.N. GAOR, 3rd Sess., pt. I, at 177, (1948).

62. U.N. Doc. A/AC.48/4, Sept. 5, 1951, reprinted in 46 AM. J. INT'L L. (Supp. 1951) [hereinafter 1951 ILC Draft Statute]. The 1951 ILC Draft Statute revision was appended to *Report of the 1953 Committee on International Criminal Jurisdiction*, U.N. GAOR, 9th Sess., Supp. No. 12, at 23, U.N. Doc. A/2645 (1954), reprinted in 2 B.B. Ferencz, *AN INTERNATIONAL CRIMINAL COURT—A STEP TOWARD WORLD PEACE: A DOCUMENTARY HISTORY AND ANALYSIS*, (2 vols.) (1980), Doc. 35 [hereinafter 1953 ILC Draft Statute]. Neither of these drafts was acted upon further. See also G.A. Res. 260 B(III) of Dec. 9, 1948, Official Records, 3d Sess., Pt. I, Resolutions, at 177 (resolution calling on the International Law Commission to study the desirability and possibility of establishing a tribunal with international criminal jurisdiction).

63. See generally Quincy Wright, *Proposal for an International Criminal Court*, 46 AM. J. INT'L L. 60 (1952) (discussing historical interest in creating a permanent tribunal with international criminal jurisdiction, and discussing a Draft Statute for an International Criminal Court prepared by the U.N. General Assembly-appointed Committee on International Criminal Jurisdiction, U.N. Doc. A/AC.484 (1951)). For a general overview of early efforts to explore the creation of a permanent international criminal tribunal, see Yuen-li Liang, *Notes on Legal Questions Concerning the United Nations*, 46 AM. J. INT'L L. 73 (1952).

64. E.g., Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entry into force Jan. 12, 1951); *International Convention on the Suppression and Punishment of the Crime of Apartheid*, adopted by the U.N. General Assembly on Nov. 30, 1973, U.N. General Assembly Document A/RES/3068 (XXVIII) (1973).

65. *Draft Convention on the Establishment of an International Penal Tribunal for the Suppression and Punishment of the Crime of Apartheid and Other International Crimes*, (Jan. 19, 1980), U.N. Doc. E/CN.4/1426 (1980), reprinted in 9 HOFSTRA L. REV. 533, at 547 (1987) [hereinafter 1981 Bassiouni Draft]. For further insight into the 1981 Bassiouni Draft Statute and other draft statutes, see generally 1 MORRIS & SCHARF, *supra* note 60, at 13, n.72.

66. U.N. Doc. A/CN.4/SER.A/1990, at 39 (1989). As a result, the General Assembly requested the International Law Commission to prepare a report that focused on the creation of such an international court. G.A. Res. 44/39, U.N. GAOR, 44th Sess., Supp. No. 49, at 1, U.N. Doc. A/44/39 (1989).

67. Professor Bassiouni led a committee of experts in preparing a draft statute for an international criminal court with jurisdiction over all international crimes. M. Cherif Bassiouni, *Draft*

International Law Commission (ILC) drafts developed during the early 1990s. A series of U.N. preparatory meetings was held leading up to the 1998 Rome Conference, for which a Consolidated Final Draft Statute was generated to be used as the principal negotiation instrument.⁶⁸

B. *The Rome Conference*

The official work of the five-week Rome Conference was organized into three primary, formal committees: the Committee of the Whole, the Working

Statute of the International Criminal Tribunal, reprinted in 15 NOVA L. REV. 373, 385-432 (1991) [hereinafter 1990 Bassiouni Draft Statute] (as revised and approved by an international committee of experts). The 1990 Bassiouni Draft Statute was routed through official United Nations channels, as were the recommendations related to a drug trafficking Court, and a recommendation was made that the ILC assume and continue work related to a permanent international criminal Court with broad jurisdiction. *Draft Code of Crimes Against the Peace and Security of Mankind*, G.A. Res. 43/164, U.N. GAOR, 43d Sess., Supp. No. 49, at 280, U.N. Doc A/43/49 (1988).

68. The ILC prepared reports to the General Assembly in 1990 and 1992, and prepared a 1993 text which it modified in 1994. *Report of the International Law Commission on the Work of its Forty-Sixth Session, Draft Statute for an International Criminal Court*, U.N. GAOR, 49th Sess., Supp. No. 10, at 43-161, U.N. Doc. A/49/10 (1994) [hereinafter 1994 ILC Draft Statute]. The 1994 ILC Draft was submitted to the General Assembly, which established the 1995 Ad Hoc Committee for the Establishment of an International Criminal Court, which met twice during 1995. The General Assembly then established the 1996 Preparatory Committee on the Establishment of an International Criminal Court ("1996 Prep Comm"), which sought to fulfill its mandate to prepare a "consolidated text" of a statute before the 1998 Rome Conference. Though the 1996 Prep Comm did not prepare a consolidated text, it prepared, in two volumes, a report with a compilation of various proposals. Each of the two volumes carries the same U.N. Document symbol. See *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I (Proceedings of the Preparatory Committee During March-April and August 1996)*, G.A., 51st Sess., Supp. No. 22, A/51/22 (1996) [hereinafter *Report of the Preparatory Committee*], reprinted in THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 60, at 385-439; *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume II (Compilation of Proposals)*, G.A., 51st Sess., Supp. No. 22, A/51/22 (1996) [hereinafter *Report of the Preparatory Committee—Proposals*], reprinted in THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 60, at 441-616.

A 1997-1998 Prep Comm, which met for several sessions during this period, was convened to carry on with the work. Various "inter-sessional meetings" were held between the scheduled Prep Comm sessions. One such meeting was the January 1998 informal meeting held in Zutphen, The Netherlands, which resulted in the "Zutphen Draft Statute." *Draft Report of the Inter-Sessional Meeting From 19 to 30 January 1998 in Zutphen, The Netherlands*, U.N. Doc A/AC.249/1998/L.13 (1998) [hereinafter *Zutphen Draft Statute*], reprinted in THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *supra* at 221-311. In the Spring of 1998, at the final Prep Comm session before the Rome Conference, the 1997-1998 Prep Comm produced a comprehensive consolidated draft that was used as the official basis for negotiations at the Rome Conference (the "Consolidated Final Draft Statute"). *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute & Draft Final Act*, U.N. Doc. A/Conf.183/2/Add.1 (1998) [hereinafter *Consolidated Final Draft Statute*].

The Consolidated Final Draft Statute was completed as scheduled by April 3, 1998, approximately two and one-half months before the Rome Conference began. See Bassiouni, *supra* note 13, at 444 n.6 (citing G.A. Res. 50/46, U.N. GAOR, U.N. Doc. A/RES/50/46 (1995)). That draft was comprehensive and detailed, but it has been described as "essentially a cumbersome accumulation of alternative governmental proposals requiring additional technical work and more extensive negotiations, particularly with regard to fundamental issues." Bassiouni, *supra* note 13, at 444. The nature of the Consolidated Final Draft, coupled with other technical glitches, not only helps to explain some of the difficulties that plagued the Rome Conference negotiations, *id.* at 444, but also may help explain inconsistencies in language, terms, and concepts incorporated into the Rome Statute and collateral instruments.

Group, and the Drafting Committee.⁶⁹ In addition, various sub-working groups, informals, and “informal informals,” along with the formal meetings, generated multitudinous written proposals for language to be incorporated into the Rome Statute.⁷⁰ Principal draft texts that contributed greatly to the Rome Statute negotiation at Rome include the following: (1) the 1951 and 1953 ILC Draft Statutes; (2) the 1981 Bassiouni Draft; (3) the 1994 ILC Draft; (4) the Zutphen Draft; (5) the Consolidated Final Draft Statute; and (6) various Rome Conference Bureau Proposals.⁷¹ Furthermore, numerous formal and informal draft proposals submitted by the national delegations and NGOs were critical

69. See *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Rules of Procedure*, U.N. Doc. A/Conf.183/2/Add.2 (1998). Generally, a proposed treaty provision was presented in the Committee of the Whole, and then referred to a Working Group which would send the provision back to the Committee of the Whole after agreement was reached. The Committee of the Whole would then debate the provision, and either send the provision to the Drafting Committee, or send it back to a Working Group for further consideration. “Informal” and “informal informal” groups hashed out finer details, then funneled their work back to the Committee of the Whole for approval, and then to the Drafting Committee. See generally Bassiouni, *supra* note 13, at 449-54 (describing and critiquing the Rome Conference drafting and negotiating process). See *Draft Report of the Committee of the Whole*, ¶ 9, U.N. Doc. A/Conf.183/C.1/L.92 (1998) (describing how Working Groups for various Rome Statute articles were established by the Committee of the Whole “to expedite the work”).

70. See generally Fanny Benedetti & John L. Washburn, *Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterword on the Rome Diplomatic Conference*, in 5 GLOBAL GOVERNANCE 1, 28-29 (1999) (discussing utilization of “routine” informal meetings during the Rome Conference, which had “turned into a marathon”).

During the Rome Conference, countless proposals and counter-proposals were circulated around the U.N. building each day, as diplomatic delegations, NGOs, and the Rome Conference Bureau sought to resolve differences and reach agreement on the most profound and controversial to the seemingly most innocuous and mundane Rome Statute provisions. Many such proposals were issued as official U.N. Rome Conference documents, while many were merely circulated but not assigned U.N. document symbols. Thus, some negotiation history is compiled in non-U.N. documents, or rests in the minds and unofficial writings of delegates and others who observed and participated in the negotiating process. For excellent unofficial chronologies and analyses of the negotiation process by participants, as well as general descriptions and critiques of the Rome Statute, see Mahnouch H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT’L L. 22 (1999); Bassiouni, *supra* note 13; Benedetti & Washburn, *supra*; Philippe Kirsch & John T. Holmes, *The Rome Conference on an International Criminal Court: The Negotiating Process*, 93 AM. J. INT’L L. 2, 5 (1999); Sadat & Carden, *supra* note 13.

The divergent backgrounds and relative levels of expertise and experience of Rome Conference delegates contributed to internal inconsistencies in the Rome Statute and its collateral instruments, and contributed to the lack of clarity on various treaty terms, see generally Bassiouni, *supra* note 13, possibly including such important terms as “internationally recognized human rights.” A major issue at Rome concerned the conflict between common law and civil law concepts related to areas such as criminal law and procedure. The drafters followed no consistent legal methodology to determine how best to meld together common law and civil law concepts in the context of comparative criminal law, resulting in awkward and undesirable accommodations of divergent perspectives. See, e.g., *id.* at 454 (noting lack of methodological explanations for placement of Rome Statute provisions). Apropos is Professor Bassiouni’s analogy of a “biological mule” versus a “diplomatic mule,” with the former being produced by breeding a horse and a donkey, and the latter being produced by cutting each animal in half and then gluing the different halves to one another.

71. In efforts to facilitate agreement, particularly in the face of obstinate delegations on critical points, the Rome Conference Bureau published during the conference “discussion papers” that reflected the Bureau’s view of appropriate compromises. While some delegates may have appreciated the discussion papers in the light in which they may have been intended, other delegates viewed them as attempts by the Bureau to hijack the negotiations in the interests of concluding the treaty by midnight, July 17, 1998, which was the deadline for adopting the treaty, after which a new Diplomatic Conference of Plenipotentiaries would need to be called. E.g., U.N. Doc. A/Conf.183/L.53 (1998).

to the negotiated outcome of the Rome Statute, as they were instrumental in informing opinions directly and indirectly in the Rome Conference principal bodies.⁷²

IV. THE ROME STATUTE & HUMAN RIGHTS

A. *Rome Statute: Basic Human Rights Provisions*

Though promoting and safeguarding the rights of suspects or accused persons may not be an expressly stated purpose or object of the Rome Statute, it is essential to the ICC's legitimacy⁷³ that the human rights of all persons affected by the ICC be enforced.⁷⁴ While it was not always clear which human rights would be enforced, or the scope of those rights, or what would constitute a rights violation, it remained clear throughout the negotiations that the rights of suspects and accused persons would be considered.⁷⁵

Accordingly, the Rome Statute provides for a panoply of individual rights. In inter-related, yet scattered provisions, the Rome Statute outlines

72. For example, following the last 1997-1998 Prep Comm session, a group of experts was convened at DePaul University College of Law to consider the Consolidated Final Draft Statute. Under the auspices of DePaul's International Criminal Justice and Weapons Control Center and the International Law Association Committee (American Branch) on a Permanent International Criminal Court, the expert group prepared a model draft statute for the ICC ("1998 DePaul Expert's Draft") with a view to facilitating the work of the Rome Conference. The 1998 DePaul Expert's Draft is entitled *Model Draft Statute for the International Criminal Court Based on the Preparatory Committee's Text to the Diplomatic Conference, Rome, June 15 - July 17 1998* [hereinafter DePaul Model Draft Statute], and is published in ASSOCIATION INTERNATIONALE DE DROIT PÉNAL, 13^{TER} NOUVELLES ÉTUDES PÉNALES (Leila Sadat Wexler & M. Cherif Bassiouni eds., 1998). The 1998 DePaul Expert's Draft, which was not issued as an official United Nations document, was intended to offer a "clean" text to be used by negotiators at Rome, who otherwise used the Consolidated Final Draft Statute, which contained more than 1000 "bracketed" words and phrases and was difficult to read. The 1998 DePaul Expert's Draft, which eliminated most of the brackets, relied on the previous work of the DePaul group, "as further illuminated by the Preparatory Committee's work and the work of NGOs interested in the progress being made on the Court." *Id.* at vii (Foreword and Explanatory Note by Leila Sadat Wexler).

73. E.g., HUMAN RIGHTS WATCH, JUSTICE IN THE BALANCE: RECOMMENDATIONS FOR AN INDEPENDENT AND EFFECTIVE INTERNATIONAL CRIMINAL COURT (1998), at <http://www.hrw.org/reports98/icc> (last visited Apr. 20, 2001).

It will be essential to the ICC's credibility and legitimacy that the Court observe the highest standards of international human rights law. This affects many aspects of the [Rome Statute], including the need for unequivocal respect for the rights of the accused and the duty of the Court to exercise its functions without adverse discrimination on the basis of gender, race or other grounds. . . .

Id., art. 20(3).

74. For example, the 1995 Ad Hoc Committee on the Establishment of an International Criminal Court noted the need for human rights safeguards in the Court's statute: "It was generally recognized that Part 4 (Investigation and prosecution) should be carefully reviewed to ensure, *inter alia*, a proper balance between two concerns, namely effectiveness of the prosecution and respect for the rights of the suspect or the accused." *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, G.A., 50th Sess., Supp. No. 22, 696 ¶ 132, U.N. Doc. A/50/22 (1995), reprinted in THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 60 [hereinafter 1995 Ad Hoc Committee Report], at 617-56.

75. All of the principal drafts relied upon throughout the entire Rome Statute negotiation and drafting process contained various iterations of multiple rights, with final agreement not being reached until the Rome Conference itself. See generally 1994 Draft ILC Statute, *supra* note 68 *passim*; Zutphen Draft Statute, *supra* note 68. Rights of suspects, the accused, and other persons were provided for in all drafts.

human rights for suspects and others during an investigation,⁷⁶ subjects under investigation,⁷⁷ arrestees or persons who appear in response to a summons,⁷⁸ persons who are to be questioned by the Prosecutor, or by national authorities at the request of the Court,⁷⁹ and accused persons.⁸⁰ It also enumerates rights

76. At least three overlapping categories of persons exist on the alleged perpetrator side of the equation: (1) suspects, for whom a reasonable belief has been formed have committed a crime; (2) the accused, who have been charged with a crime; and (3) persons during an investigation, who may never become suspects or accused. Rights of persons during an investigation and rights of persons accused of committing crimes are provided for primarily in Rome Statute, articles 55 and 67. A person may be under investigation without the Prosecutor having formed the reasonable belief that the person has committed a crime (and thus elevating that person into a "suspect" when he or she would not otherwise be regarded as one). After being charged with a crime, a person becomes an accused, and arguably acquires additional rights. An accused might also be subject to further investigation, in which case protections for suspects and persons under investigation would continue to apply. Rome Statute, *supra* note 3, arts. 55, 67.

77. Article 55 provides for the right against compelled self-incrimination and the right to be free from being compelled to contest guilt, Rome Statute, *supra* note 3, art. 55(1)(a); freedom from any form of coercion, duress, or threat or torture or other cruel, inhuman or degrading treatment or punishment, *id.*, art. 55 (1)(b); freedom from arbitrary arrest or detention, *id.*, art. 55(1)(d); and, "if questioned in a language other than a language the person fully understands and speaks," the person has the right to "have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness," *id.*, art. 55(1)(c). It is unclear whether the qualifier "as are necessary to meet the requirements of fairness" applies only to "translations" or to both "translations" and "the assistance of a competent interpreter," as the syntax of article 55(1)(c) is arguably ambiguous.

Article 55 also provides that "where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court," and where "that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9 [of the Rome Statute]," then "that person shall also have the following rights of which he or she shall be informed prior to being questioned." *Id.*, art. 55(2)(a). The section goes on to list the following rights: the right to be informed before questioning "that there are grounds to believe" that he or she has committed a crime within the Court's jurisdiction, *id.*, art. 55(2)(a); the right to remain silent, "without such silence being a consideration in the determination of guilt or innocence," *id.*, art. 55(2)(b); the right "[t]o have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it," *id.*, art. 55(2)(c). It is unclear whether the qualifying language "in any case where the interests of justice so require" applies to both: (a) the right "[t]o have legal assistance of the person's choosing"; and (b) the right "to have legal assistance assigned to him or her." Furthermore, the Rome Statute provides for the right "[t]o be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel." *Id.*, art. 55(2)(d).

78. *E.g.*, Rome Statute, *supra* note 3, art. 57(3)(c) (privacy provision); *Id.*, art. 58 (provisions related to arrests, and arrest warrants, summonses to appear); Draft Rules of Procedure, rules 173-75; *see also* Rome Statute, art. 59(3) (right in custodial state to apply for interim release pending surrender). Article 55(1)(d) also contains privacy rights related to seizure of persons, in providing for the right not to be subjected to arbitrary arrest or detention, and the right to be free from deprivation of liberty except in accordance with procedures established in the Rome Statute. Rome Statute, *supra* note 3, art. 55(1)(d).

79. *Id.*, art. 55(2). These guarantees would apply to national authorities if the questioning by those authorities had been requested by the Court pursuant to Part 9 of the Rome Statute. The guarantees arguably would not apply if the national authorities independent of any Court request were to question a person. *Id.* Thus, a gap in guarantees exists, as it is highly likely that a national authority will question persons in conjunction with a crime within the Court's jurisdiction, in a manner contrary to the rights provided in article 55(2), with no recourse if the information acquired by the national authority is subsequently turned over to the Court or Prosecutor or otherwise used against the person in an ICC prosecution.

80. Rights of the accused are provided for primarily in Rome Statute, *supra* note 3, article 67. "A substantial number of delegations stressed the need to guarantee minimum rights for the accused in conformity with article 14 of the International Covenant on Civil and Political Rights." 1995 *Ad Hoc*

for witnesses and victims,⁸¹ and for a wide range of other individuals⁸² at all stages of ICC functions—from early investigation, through trial, through appeal and revision of sentence, to sentence execution.

A wealth of rights are afforded to persons who have passed through the initial investigation stage and are accused. These wide-sweeping rights, primarily contained in article 67,⁸³ mimic rights included in international

Committee Report, *supra* note 74, ¶ 173. The Trial Chamber “shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused,” Rome Statute, *supra* note 3, art. 64(2).

81. Rome Statute, *supra* note 3, article 68, and the Draft Rules of Procedure, *supra* note 5, chap. 4, § III, provide for victims and witnesses. Article 68(1) provides, in relevant part: “The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.” The Statute recognizes the attempt to balance rights of the accused against rights of victims and witness: “The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.” *Id.* Prosecutors must respect the rights of victims and witnesses (arts. 54(1)(b)), as must the Pre-Trial Chamber (art. 57(3)(c)) and the Trial Chamber (art. 64(2)). *Id.*, arts. 54(1)(b), 57(3)(c), 64(2). A trust fund will be established for victims. *See* Rome Statute, *supra* note 3, art. 79; Draft Rules of Procedure, *supra* note 5, rule 97. Reparations may also be awarded. *Id.*, art. 75; Draft Rules of Procedure, *supra* note 3, rules 94-98.

82. The Rome Statute enumerates rights for the following persons: persons convicted by the Court, Rome Statute, *supra* note 3, art. 84; persons previously acquitted or convicted by the Court or by other tribunals, *id.*, art. 20, “*Ne bis in idem*”; persons to be or who have been sentenced, *id.*, arts. 76, 81, 84, 108; bona fide third parties and appellants, *id.*, arts. 81, 82, 83; and experts, *id.*, art. 93(2). The Rome Statute provides for the rights of youth, *id.*, art. 26 (specifically mandating that there shall be no ICC jurisdiction over persons under the age of 18), and of the acquitted, *id.*, art. 66(3) (implicitly acknowledging the right where the Court is not “convinced of the guilt of the accused beyond reasonable doubt,” but not noting other rights of the acquitted, for example a right to recover defense counsel fees). It also safeguards rights of persons wrongfully convicted by the Court or wrongfully arrested, *id.*, art. 84 (revision of conviction or sentence), *id.*, art. 85 (wrongfully arrested and convicted persons compensated as “victims”).

“Persons” in general are covered by confidentiality requirements (art. 54(3)(f)), and “everyone” is entitled to the presumption of innocence (art. 66). *Id.*, arts. 54(3)(f), 66. Furthermore, “persons” in general are covered by “rights” that are categorized in the Rome Statute as “general principles of criminal law.” Rome Statute, *supra* note 3, arts. 22-33. These rights include: “*Nullum crimen sine lege*,” *id.*, art. 22; “*Nulla poena sine lege*,” *id.*, art. 23; “*non-retroactivity ratione personae*,” *id.*, art. 24; exclusion of jurisdiction for persons under eighteen, *id.*, art. 26. Furthermore, Rome Statute articles 6, 7 and 8 (and corresponding articles from the Draft Element of Crimes) detail the crimes within the Court’s jurisdiction.

83. These rights include the following: the right “[t]o be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks,” Rome Statute, *supra* note 3, art. 67(1)(a); the right to have adequate time and facilities to prepare the defense and “to communicate freely with counsel of the accused’s choosing in confidence,” *id.*, art. 67(1)(b); the right “[t]o be tried without undue delay,” Rome Statute, *supra* note 3, art. 67(1)(c); and the right to be present at trial, *id.*, arts. 63(1), 67(1)(d), subject to article 63(2), providing for removal of a disruptive accused from the Courtroom.

Additionally, the accused has the following rights: the right “to conduct the defence in person or through legal assistance of the accused’s choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it,” *id.*, art. 67(1)(d); the right “[t]o examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her,” *id.*, art. 67(1)(e); the right “to raise defences and to present other evidence admissible under the [Rome Statute],” *id.*, art. 67(1)(e); the right “[t]o have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks,” Rome Statute, *supra* note 3, art. 67(1)(f). *See also* Rome Statute, *supra* note 3, art. 55 (corresponding provision for rights of persons during an investigation).

instruments such as the ICCPR.⁸⁴ The chapeau to these enumerated fair trial rights, which bills the rights as "minimum guarantees," provides: "In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of [the Rome Statute], to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality"⁸⁵

Significantly, in some instances, these rights are elaborated more broadly than in major international human rights instruments, including the ICCPR, while in other cases they are in the language of the ICCPR.⁸⁶ However, in some respects, the Rome Statute's express human rights provisions fall short.⁸⁷

The overarching umbrella human rights provision is found in Rome Statute, article 21, which outlines the sources of law to be applied within the ICC framework. Specifically, Rome Statute, article 21(3) provides: "The application and interpretation of law pursuant to [article 21] must be consistent with internationally recognized human rights."⁸⁸ The Rome Statute

Included also are the right "[n]ot to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence," *id.*, art. 67(1)(g); the right "[t]o make an unsworn oral or written statement in his or her defence," *id.*, art. 67(1)(h); and the right "[n]ot to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal," *Id.*, art. 67(1)(i). Furthermore, Rome Statute, article 67 provides that the "Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence." *Id.*, art. 67(2). The rights of suspects under article 55 would continue to apply once a suspect (or a person during an investigation) becomes an accused (is charged with a crime).

84. See generally ICCPR, *supra* note 25, art. 14(3) (containing fair trial rights).

85. Rome Statute, *supra* note 3, art. 67, "Rights of the accused." Some of the rights contained in article 67 that apply to the accused are repeated from article 55, which pertains to the rights of persons during an investigation. *Id.*, arts. 55, 67.

86. For example, under the Rome Statute, *supra* note 3, article 67(g), the accused not only has the right to remain silent, but also, that silence cannot be used against him or her in the Court's determination of guilt or innocence.

87. E.g., Blakesley, *AALS Panel Discussion*, *supra* note 18 (defense rights lacking); Blakesley, *Commentary*, *supra* note 18, at 88-89 (search and seizure rights lacking); Gallant, *supra* note 7 (privacy and other rights lacking).

88. Rome Statute, *supra* note 3, article 21(3) in its entirety, contains a broad non-discrimination clause:

The application and interpretation of law pursuant to [article 21] must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender, as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

The drafters rejected simplified non-discrimination language such as that proposed by Guatemala. See PROPOSAL SUBMITTED BY GUATEMALA, U.N. Doc. A/Conf.183/C.1/WGAL/L.4 (1998) (proposing that the "principle of non-discrimination shall be applied to men, women and children"). Instead, the drafters adopted a non-discrimination clause that is not unlike those contained in international human rights law instruments, such as the ICCPR. E.g., ICCPR, *supra* note 25, art. 26 (containing "or other status" phraseology). Article 21(3)'s broad, all-inclusive non-discrimination clause reflects a dramatic compromise struck regarding the term "gender," the definition of which was rigorously negotiated during the final week of the Rome Conference. The qualifying language following each mention of "gender" in the Rome Statute was inserted to satisfy delegations who were wary of the term "gender," because of the purported non-existence of the term or concept of "gender" in the Arabic language, and to satisfy Arab delegations, the Holy See and others that stridently objected to including "gender" in the list, in part because they were concerned that "gender" would include "sexual orientation" (which is

does not define the term "consistent" or "internationally recognized human rights."⁸⁹

The human rights obligations imposed by article 21(3) extend to all law to be applied and interpreted by the ICC, and to all aspects of the operation of the Court, including acts of the Prosecutor,⁹⁰ the judges,⁹¹ and the Assembly of States Parties,⁹² and, quite probably, to acts of States Parties themselves, IGOs and others who cooperate with the ICC.⁹³ This law includes the Statute, the Elements of Crimes, the Rules of Procedure, and other principles and rules of international law referred to in articles 21(1) and 21(2).⁹⁴

While the greater emphasis during the 1998 Rome Conference negotiations was the establishment of a Court that would eradicate impunity for perpetrators of heinous crimes,⁹⁵ the incorporation of human rights was also emphasized. Rights under the Rome Statute were the subjects of lengthy debate. All delegations favored including many rights, though they disagreed as to which rights to include, with some delegations actively opposing certain

nevertheless incorporated either as part of the article 7, paragraph 3 definition of gender itself, or as an "other status"). The Rome Statute's article 23(3) has become an "advocate's dream" because of its expansiveness, despite the hostility of some delegations to the notion of including sexual minorities as a "protected group."

One commentator, who happened to be the Secretary of the Committee of the Whole, noted that the drafters' attempts to insert limiting language might have backfired, resulting in expanded rather than decreased human rights coverage:

While the original intention behind this paragraph may have been to limit the court's powers in the application and interpretation of the relevant law, it could have the opposite effect and broaden the competence of the court on these matters. It provides a standard against which all the law applied by the court should be tested. This is sweeping language, which, as drafted, could apply to all three categories in article 21. For instance, if the court decides that certain provisions of the Elements of Crimes or the Rules of Procedure and Evidence are not compatible with the standards set out in paragraph 3 of article 21, it would not have to apply them. The provision also lays down special rules of interpretation for article 21.

Arsanjani, *supra* note 70, at 29.

89. See discussion *infra* Subsections VI.C.1.a-b (discussing the phrase "consistent with internationally recognized human rights").

90. Article 54(1)(c) provides that the Prosecutor must "[f]ully respect the rights of persons arising under [the Rome] Statute." See also Marcella David, *Grotius Repudiated: The American Objections to the International Criminal Court and the Commitment to International Law*, 20 MICH. J. INT'L L. 337, 366 (1999) (noting that "the [ICC] Prosecutor is required to respect the procedural rights of persons connected with the investigation").

91. The judges are chiefly charged with applying and interpreting the law. Rome Statute, *supra* note 3, article 21(3) directly speaks to judges qua judges to act consistently with internationally recognized human rights.

92. The Assembly of States Parties is obligated to ensure that its acts in promulgating the Elements of Crimes and Rules of Procedure, and other acts, are consistent with internationally recognized human rights. See Rome Statute, *supra* note 3, arts. 21(3), 51(5), 112(2)(g); see also Gallant, *supra* note 7, at 702, n.50 (citing the Rome Statute, *supra* note 3, art. 112(2)(g) for the proposition that the "Assembly of States Parties may perform other functions 'consistent with this Statute or the Rules of Procedure and Evidence'").

93. Though article 21(3) arguably may not directly apply to States Parties, IGOs, or others who might engage in cooperation with the ICC, States Parties and other entities that do cooperate may be required to comply with norms contained in article 21(3). See Gallant, *supra* note 7, at 712-13.

94. For a discussion of the other principles and rules of international law to be applied and interpreted by the Court, see *infra* Subsection VI.C.5.

95. See discussion *infra* Section V.A.

rights.⁹⁶ Once rights were agreed to, additional controversy surrounded the substantive breadth of particular rights.⁹⁷ Notably, the express search and seizure privacy right was a casualty of Rome Conference deliberations; it was deleted from the Final Consolidated Draft Statute during a Working Group session in Rome.⁹⁸

B. *Search and Seizure Privacy Rights and the Rome Statute*

1. *Deletion of Search and Seizure Privacy Rights from the Rome Statute*

It might be argued that the conspicuous omission of the express search and seizure privacy right evidences the drafters' intent to excise the right from Rome Statute coverage. However, the express search and seizure privacy right was omitted not because the drafters believed that suspects and accused persons did not deserve the right, but rather because delegates believed that the right was or should be incorporated elsewhere in the treaty's collateral instruments. During the penultimate week of the Rome Conference, the Working Group on Procedural Matters⁹⁹ discussed the search and seizure privacy rights provision, which was incorporated into draft article 67(3) of the Consolidated Final Draft Statute, along with a due process provision, which was incorporated into draft article 67(4).¹⁰⁰ Though many if not most

96. See, e.g., *supra* note 88 (regarding battle to include sexual orientation and certain women's rights in the Rome Statute).

97. For example, the *travaux préparatoires* evidence disagreements and confusion as to the scope of the rights to be provided in the Rome Statute. It was noted that "while there was general agreement that it was essential to ensure that the accused should have a fair trial, some difference of opinion arose as to the exact meaning of 'fair trial'. The concept of 'fair trial' was said to be capable of as many interpretations as there were criminal procedures in the world." U.N. Doc. A/Conf.183 (1998).

98. See discussion *infra* Subsection IV.B.1.

99. Official U.N. summaries or verbatim transcripts are not available for the Working Group on Procedural Matters. However, unofficial notes taken during some of the Working Group sessions are available and are on file with the Author.

100. Tabled for discussion at the end of the penultimate week of the Rome Conference were draft articles 67(3) and 67(4) of the Consolidated Final Draft Statute, *supra* note 68. Draft Article 67(3) provided:

The right of all persons to be secure in their homes . . . papers and effects against entries, searches and seizures shall not be impaired . . . except upon warrant issued . . . in accordance with Part 9 or the rules of the Court, for adequate cause and particularly describing the place to be searched and the things to be seized, or except on such grounds and in accordance with such procedures as are established by the Rules of the Court.

Id., art. 67(3).

Draft Article 67(4) provided: "No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, without due process of law." *Id.*, art. 67(4).

A footnote attached to draft article 67 provided that the search and seizure and the due process provisions "are of a general nature [and] should perhaps be located in another part of the Statute." *Id.* Furthermore, that footnote provided that the due process provision "could be reformulated." *Id.*

A distinct relationship exists between the search and seizure privacy right and the due process right, as they are both tied closely to the right to a fair trial. If evidence is seized through a search that violates the right to privacy, it can be deemed unfair to present that evidence against the accused at trial. In many instances, furthermore, particularly with respect to prosecutions by international tribunals such as the ICC, if the remedy is not exclusion there will be no remedy for the privacy invasion. Fair trial or due process rights, "by virtue of their incorporation into the ICCPR . . . have been recognized to be of

delegations who addressed the topic during the Working Group discussions favored deletion of the pair of search and seizure and due process provisions,¹⁰¹ it was because it was thought that those rights were covered in other Parts of the Rome Statute, including in Part IX.¹⁰² Thus, despite urgings for a strong, express search and seizure privacy provision,¹⁰³ the search and seizure privacy right provision was unceremoniously removed from further consideration.

2. *Inclusion of Search and Seizure Rights in Earlier Rome Statute Drafts*

The search and seizure right to privacy text excised from the Rome Statute had been incorporated into ICC draft statutes as early as 1996, mid-way through the treaty negotiations. Reviewing the drafting history related to the deleted provision sheds light on possible justifications for why the text was deleted during the final days of the Rome Conference.

Neither the 1951 or 1953 ILC Draft Statute, nor the 1981 Bassiouni Apartheid Draft Statute or 1993 Bassiouni Draft, contained express search and seizure privacy rights, though early drafts generally elaborated human rights

universal application." Bartram S. Brown, *Nationality and Internationality in International Humanitarian Law*, 34 STAN. J. INT'L L. 347, 360-61 (1998).

101. States that spoke in favor of deleting the provisions included Austria, Canada, Iran, Korea, and Oman. *Notes of July 10, 1998, taken during Working Group on Procedural Matters Session* [hereinafter *Working Group Notes*] [on file with the Author].

102. Rome Statute, *supra* note 3, Part IX (International Cooperation and Judicial Assistance) was identified, along with Parts 5, 6 and the Rules of Procedure and Evidence, as containing content that overlapped with the proposed search and seizure privacy and due process rights. Thus, there was a call for deleting the search and seizure and due process rights from that draft Article. *Working Group Notes, supra* note 101. The pair of provisions was absent from the Working Group on Procedural Matters next Report to the Committee of the Whole immediately following the Working Group session during which the provisions were deleted. *Committee of the Whole, Summary Record of the 33rd Meeting, 13 July 1998*, ¶ 44, U.N. Doc. A/Conf.183/C.1/SR.33 (1998).

Though it was argued that Part IX contains search and seizure privacy provisions, and thus there was no need to repeat those provisions in a separate search and seizure provision, arguably neither Part IX nor any other Part of the Rome Statute (including other collateral treaty documents, such as the Draft Rules of Procedure) explicitly provides adequate search and seizure privacy right coverage. *See* discussion *infra* Section IV.C (discussing Part IX's failure to provide for privacy search and seizure rights).

103. During the Rome Conference and during the final 1997-1998 Prep Comm session earlier that year, negotiators had the benefit of scholarly commentary that called for strong search and seizure provisions. For example, one commentator stressed the need for the search and seizure article, and argued that as proposed, the article was too limited and should be expanded. Professor Blakesley contended:

An article [like the search and seizure article] must be included, and the Pre-Trial Chamber should be allowed to issue such search/entry warrants. As written, however, this paragraph is much too limited. Should it not also apply to the "persons" of the accused? Otherwise, could blood be taken (searched/seized)? Other tissue? A stomach be pumped? A body cavity searched for evidence? Does it mean that other violations of the autonomy of the person, even if intrusive could be allowed without judicial approval? In addition, what about communications intended to be private? Could a "wire-tap" be allowed without judicial approval? This article leaves open many serious issues that need to be addressed.

Blakesley, *Commentary, supra* note 18, at 88-89.

to be afforded to persons, including the accused.¹⁰⁴ Similarly, the 1994 ILC Draft Statute,¹⁰⁵ which was used as a starting point for negotiations at formal and informal pre-Rome Conference sessions, did not contain a provision regarding the search and seizure right to privacy in its “rights of the accused” section, or elsewhere in the draft, though it contained an extensive list of human rights safeguards. In 1996, various delegations to the 1996 Preparatory Committee suggested incorporating a search and seizure provision in the 1994 ILC Draft Statute. Australia and The Netherlands submitted a joint proposal to incorporate into the draft the following language, which is not dissimilar to the Fourth Amendment to the U.S. Constitution:¹⁰⁶

The right of all persons to be secure in their homes, papers and effects against entries, searches and seizures shall not be impaired except upon warrant issued, in accordance with the rules of the Court, for adequate cause and particularly describing the place to be searched and things to be seized, or except on such grounds and in accordance with such procedures as are established by the rules of the Court.¹⁰⁷

The Australia and Netherlands proposal was not adopted.

On August 4, 1997, the 1997-1998 Preparatory Committee organized its work through two groups, one of which was the Working Group on Procedural Matters. The Working Group on Procedural Matters recommended numerous criminal procedure modifications to the ILC Draft Statute through its report (the Fernandez Report),¹⁰⁸ including draft article 41(3), which is a

104. See generally 1951 ILC Draft Statute, *supra* note 62; 1953 ILC Draft Statute, *supra* note 62; 9 NOUVELLES ÉTUDES PÉNALES 1993, reprinted in THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 60, at 759, 771-74) (highlighting in the draft statute’s commentary “standards of fairness which are to be guaranteed in all proceedings before the Organs of the Tribunal and which are to be reflected in the Procedures and Rules to be promulgated by the said Organs”).

105. 1994 ILC Draft Statute, *supra* note 68.

106. U.S. CONST. amend. IV provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

107. Report of the Preparatory Committee—Proposals, *supra* note 68; see identical Japan proposal, *id.* at 217. In 1993, the United States submitted a comprehensive proposal regarding the proposed Rules of Procedure and Evidence for the ICTY. *Suggestions Made by the Government of the United States of America: Rules of Procedure and Evidence for the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia*, IT 14, Nov. 17, 1993, reprinted in 2 MORRIS & SCHARF, *supra* note 60, at 509-63. That proposal contained a section concerning the right to privacy. It provided:

Relevant evidence seized from the person or control of the accused or obtained as a result of the use of electronic surveillance, undercover investigators, informant information, or search and seizure is admissible unless obtained by methods so offensive to fundamental principles of fairness and due process that its admission is antithetical to, and would seriously damage, the integrity of the proceedings.

Id. at 546.

108. *Decisions Taken by the Preparatory Committee at its Session Held from 4 to 15 August 1997*, U.N. Doc. A/AC.249/1997/L.8/Rev.1 (1997) [hereinafter Fernandez Report]. Ms. Silvia Fernandez de Gurmendi chaired the working group. The working group recommended modifications on various articles, including articles related to investigation of alleged crimes, functions of the Pre-Trial Chamber in relation with investigation, commencement of prosecution, notification of the indictment, trial in the presence of the accused, functions and powers of the Trial Chamber, proceedings on an admission of guilt, presumption of innocence, and rights of the accused, victims and witnesses. The

slightly modified, more detailed version of the 1996 Australia/Netherlands proposal. It provided:

The right of all persons to be secure in their homes and to secure their papers and effects against entries, searches and seizures shall not be impaired by the Court except upon warrant issued by the Court [Pre-Trial Chamber], on the request of the Prosecutor, in accordance with Part 7 or the Rules of the Court, for adequate cause and particularly describing the place to be searched and things to be seized, or except on such grounds and in accordance with such procedures as are established by the Rules of the Court.¹⁰⁹

The next major revision, the 1998 Zutphen Draft Statute,¹¹⁰ contained a version of the search and seizure provision without material change from the Fernandez Report version.¹¹¹ The Consolidated Final Draft of the Statute presented to the Rome Conference for consideration contained a search and seizure provision substantively identical to the one contained in the Zutphen Draft Statute.¹¹²

Despite some countries' insistence on an express search and seizure privacy provision, such a provision was not included, in part, because it was thought that such privacy rights were incorporated into Rome Statute, Part IX provisions related to international cooperation and judicial assistance. While the drafters might have felt secure in omitting the right in reliance on Part IX, Part IX does not appear expressly or adequately to protect the search and seizure privacy right.

C. *International Cooperation and Judicial Assistance: Rome Statute, Part IX—Search for the Right to Privacy*

Some Rome Conference delegates contended that Part IX provides for search and seizure privacy rights.¹¹³ It was suggested that these protections would lie in Rome Statute, articles 86, 88, 93, 96, and 99 (and perhaps in article 69(8) from Part VI).¹¹⁴ Although those articles draw upon criminal procedures incorporated into multilateral and bilateral mutual legal assistance treaties, they fail expressly to cover the promised search and seizure right to privacy.

working group considered "the text of . . . articles concerning procedural matters as a first draft for inclusion in the draft consolidated text of the convention for an international criminal Court." *Id.* at 13.

109. *Id.* at 36. A footnote to this iteration provides that the rights addressed in this paragraph "are of a general nature" and "should perhaps be located in another part of the Statute." *Id.* However, these issues are now not addressed expressly in any part of the Rome Statute, in the Draft Rules of Procedure, or in any other collateral instrument.

110. Zutphen Draft Statute, *supra* note 68, art. 60[41] (rights of the accused).

111. The Zutphen Draft bracketed "Court" in the phrase "except upon warrant issued by the [Court]" whereas it was not bracketed in the Fernandez Report. Re-numbering caused by the rolling text changed the "Rights of the Accused" from article 41 to article 60, and "Part 7" referred to in the Fernandez Report was changed to "Part 9[7]." *Id.* The footnote remained.

112. In the Final Consolidated Draft Statute, the only modifications to the search and seizure article were technical: renumbering of the article from 60 to 67, and deleting the reference to Part 7. Consolidated Final Draft Statute, *supra* note 68, art. 67(3). The footnote remained.

113. See *supra* note 102 (discussing the contention that Part IX and other sections of the Rome Statute provide for search and seizure and due process rights).

114. See discussion *infra* Subsection IV.C.3.

1. *The Prosecutor's Need to Acquire Evidence from Abroad*¹¹⁵

The ICC prosecutor's job of investigating and prosecuting crimes within the Court's jurisdiction¹¹⁶ is especially difficult because the physical evidence needed by the prosecution to make appropriate showings will typically be located in either the territory of a State Party or in the territory of a non-party state.¹¹⁷ At various stages of an ICC investigation and/or prosecution, the prosecution must proffer evidence sufficient to sustain charges against accused persons,¹¹⁸ to sustain a conviction,¹¹⁹ and to sustain Court-ordered requests for State co-operation,¹²⁰ and summonses and arrest warrants.¹²¹ Under prevailing rules of state sovereignty and under the Rome Statute itself, the ICC may not unilaterally violate a State's sovereignty to retrieve evidence for use in an ICC investigation or prosecution without permission. Pursuant to Rome Statute, Part IX, entitled "International Cooperation and Judicial Assistance," States Parties agree to cooperate with the Court in gathering and transferring evidence to further the ICC's investigation and prosecution of crimes within the jurisdiction of the ICC.¹²²

Part IX is ostensibly based on developing principles of transnational legal assistance in criminal matters. As the world has grown smaller and criminal enterprises have broadened, domestic crimes increasingly have become international in scope. As the criminal process has transcended national boundaries, so too have enforcement and prosecution efforts. In recent years, various governments, inter-governmental groups and other international groups (for example, Interpol, the United Nations, the Council of Europe, and the Schengen countries) have recognized the need for global cooperation in crime detection and prosecution primarily in such areas as drug trafficking, money laundering, commercial crimes, and crimes involving use of the internet, and have entered into multi-lateral and bi-lateral agreements to achieve that cooperation.

115. This section of the Article is framed in terms of the Prosecutor's need for evidence since search and seizure privacy right issues will most likely occur when the Prosecutor seeks to discover evidence to use against an accused at trial, rather than, for example, when a defendant seeks to discover exculpatory evidence.

116. Rome Statute, *supra* note 3, arts. 42(1), 53, 54.

117. The physical evidence could conceivably be in the hands of an inter-governmental organization ("IGO"), such as NATO or the United Nations. Nevertheless, the IGO would still be located in either a party or non-party state, and the laws of that State and ICC law related to that State would likely govern evidence gathering therein.

118. Rome Statute, *supra* note 3, art. 61(1) provides for a process whereby "within a reasonable time after the person's surrender or voluntary appearance before the Court, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the prosecutor intends to seek trial." Rome Statute, article 61(5) spells out the burden of the prosecution regarding confirmation: "At the hearing, the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged."

119. For conviction, the prosecutor must prove an accused person's guilt, and the Court must be convinced of the accused person's guilt beyond a reasonable doubt. *See id.*, arts. 66(2)-(3).

120. *See id.*, Part IX.

121. The prosecutor must prove reasonable grounds for a summons or arrest warrant. *See id.*, arts. 58(7), 58(1).

122. *Id.*, Part IX.

2. *Mutual Legal Assistance in Criminal Matters—Multilateral & Bilateral Legal Assistance Treaties*

Part IX of the Rome Statute, which purportedly covers the right to privacy in the search and seizure context, draws upon principles found in bilateral and multilateral mutual legal assistance treaties (MLATs).¹²³ However, Part IX arguably offers little if any such coverage. MLATs, which have increasingly replaced noncompulsory letters rogatory for the seeking of foreign assistance in criminal matters,¹²⁴ are not human rights treaties and indeed routinely cannot be used by an accused person for the gathering of evidence.¹²⁵

Various MLAT schemes expressly address search and seizure privacy rights. For example, the Mutual Assistance in Criminal Matters within the Commonwealth Scheme of 1996¹²⁶ outlines search and seizure in the Commonwealth. The Commonwealth Law Ministers, in a May 1999 meeting, examined search and seizure issues involving the interception of telecommunications and other forms of electronic surveillance and the "taking of personal samples," and the Law Ministers examined the utility of

123. E.g., Bruce Zagaris, *Mexico and the U.S. Conclude Narcotics Cooperation Agreement*, 5 INT'L L. ENFORCEMENT REP. 87 (1989). For an interesting yet dated general article on judicial assistance and cooperation in criminal matters in the former Yugoslavia, see D. Krapac, *An Outline of the Recent Development of the Yugoslav Law of International Judicial Assistance and Cooperation in Criminal Matters*, 34 NETH. INT'L L. REV. 324, 324-42 (1987).

124. 1 MORRIS & SCHARF, *supra* note 60, at 311 ("Notwithstanding the emergence of international and regional organizations with competence in a wide range of areas, the international legal system is still primarily a decentralized system of independent sovereign States, particularly in the field of criminal law."); Henry H. Perritt, Jr., *Jurisdiction in Cyberspace*, 41 VILL. L. REV. 1, 83-84 (1996).

125. Geoffrey R. Watson, *Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction*, 17 YALE J. INT'L L. 41, 75-76 (1992). MLATs typically address the following: scope of application (type of assistance covered); obligations to request assistance; limitations on request compliance; nature and form of requests and their execution; costs of execution; limitations of use of fruits of execution; taking of evidence, locating persons, and serving documents; transferring persons in custody; certification and authentication of documents; transfer of government documents and records; and proceeds of crime. Furthermore, typical agreements contain a separate search and seizure provision. E.g., Treaty on Mutual Legal Assistance in Criminal Matters, S. TREATY DOC. NO. 100-14 (1985). Article XVI of that treaty provides, for example, that a "a request for search and seizure shall be executed in accordance with the requirements of the law of the Requested State." For a comprehensive article on more than one dozen bilateral MLATs entered into by the United States, see generally Alan Ellis & Robert L. Pisani, *The United States Treaties on Mutual Assistance in Criminal Matters*, in 2 INTERNATIONAL CRIMINAL LAW: PROCEDURAL AND ENFORCEMENT MECHANISMS 403-55 (M. Cherif Bassiouni, 2d. ed. 1999).

126. *Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth Including Amendments Made by Law Ministers in April 1990* (Harare 1986), reprinted in INTERNATIONAL CRIMINAL LAW: A COLLECTION OF INTERNATIONAL AND EUROPEAN INSTRUMENTS (Christine Van Den Wyngaert & Guy Stessens eds., 1996); see also Schengen Convention, Title 111, ch. 2, at 345-55 (June 19, 1990). Title III, ch. 2 of the Schengen Convention is intended to supplement the *European Convention of 20 April 1959 on Mutual Assistance in Criminal Matters*, (*Benelux Treaty on Extradition and Mutual Assistance in Criminal Matters of 27 June 1962* (as amended by Protocol of May 11, 1974), and to facilitate implementation of the Agreements. Article 55 of the Schengen Convention provides: "The Contracting Parties may not make the admissibility of letters rogatory for search or seizure dependent on conditions other than the following . . . (b) execution of the letters rogatory is consistent with the law of the requested contracting party." *Id.*

developing a uniform Commonwealth approach to various issues, including search and seizure.¹²⁷

The Conference on Security and Cooperation in Europe (CSCE)¹²⁸ met in 1991 in Moscow to discuss the right to privacy in the search and seizure context,¹²⁹ and agreed on a scheme of privacy safeguards.¹³⁰ Furthermore, on January 31, 2000, the European Parliament addressed privacy right issues in criminal investigations in its report on the draft Council Act Establishing the Convention on Mutual Assistance in Criminal Matters between the Member States of The European Union.¹³¹ The report emphasized a need for members to comply with the European Human Rights Convention¹³² and the need to harmonize discrepancies among Member States' respective legal systems by bringing all the legal systems into line with those offering the strongest human rights safeguards for the defense.¹³³ The report suggested amendments to curtail communication interception, recommended improving safeguards for individuals' fundamental rights, including the right to privacy, and recognized the traditional trade-off between law enforcement goals and safeguarding the rights of all, including the rights of accused persons.¹³⁴

127. *Meeting of Commonwealth Law Ministers: Port of Spain, Trinidad and Tobago, May 3-7 1999*, 28 COMMONWEALTH CRIME WATCH 1, ¶ 44 (1999), at <http://www.thecommonwealth.org/gender/htm/info/info/communiques/1999/9931.htm>; see 15 INT'L L. ENFORCEMENT REP. 379, 379-80 (1999).

128. The CSCE was created pursuant to the *Conference on Security and Co-Operation in Europe Final Act*, Aug. 1, 1975, 14 I.L.M. 1292.

129. *Conference on Security and Co-operation in Europe: Document of the Moscow Meeting on the Human Dimension, Emphasizing Respect for Human Rights, Pluralistic Democracy, the Rule of Law, and Procedures for Fact-Finding*, Oct. 3, 1991, reprinted in 30 I.L.M. 1670.

130. The CSCE final document provides:

The [CSCE] participating states reconfirm the right to the protection of private and family life, domicile, correspondence and electronic communications. In order to avoid any improper or arbitrary intrusion by the State in the realm of the individual, which would be harmful to any democratic society, the exercise of this right will be subject only to such restrictions as are prescribed by law and are consistent with internationally recognized human rights standards. In particular, the participating States will ensure that searches and seizures of persons and private premises and property will take place only in accordance with standards that are judicially enforceable.

Id., available at <http://www.osce.org/odihr/docs/compilation/compilation-1991mos.htm> (last visited Apr. 21, 2001).

131. European Parliament, *Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, Report on the Draft Council Act Establishing the Convention on Mutual Assistance in Criminal Matters between the Member States of The European Union* (9636/1999—CS-0091/1999 and SN 5060/1999—CS-0331/1999—1999/0809(CNS), Final A5-0019/2000, RR/403243EN.doc, PE 232.057.fin, cited in 16 INT'L L. ENFORCEMENT REP. 693, 693-96 (2000) [hereinafter European Parliament Report]).

132. European Convention on the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, 1953 (entered into force Sept. 3, 1953) [hereinafter European Convention]. The European Council, since 1996, has attempted to provide EU Member States with a new instrument for judicial cooperation in criminal matters. The Council is required to consult with the European Parliament, pursuant to the Rome Treaty on the European Union, arts. 39(1), 34(2)(b), 34(2)(c), 34(2)(d).

133. 16 INT'L L. ENFORCEMENT REP., *supra* note 131, at 695.

134. For a discussion of the Draft Convention in the context of the United Kingdom, see CHRISTOPHER MURRAY & LORNA HARRIS, *MUTUAL ASSISTANCE IN CRIMINAL MATTERS: INTERNATIONAL CO-OPERATION IN THE INVESTIGATION AND PROSECUTION OF CRIMES* (2000), cited in 16 INT'L L. ENFORCEMENT REP., *supra* note 131, at 695.

3. *Rome Statute, Part IX—Mimicking the MLATs—Is There a Search and Seizure Privacy Right in International Cooperation and Judicial Assistance?*

Part IX of the Rome Statute mimics the scores of multilateral and bilateral MLATs and other international and regional efforts that facilitate criminal prosecutions transnationally, and it appears to attempt to incorporate the highlights of those arrangements.¹³⁵ Though the typical MLAT modestly covers search and seizure privacy, some of that coverage is not expressly incorporated into the Rome Statute and Draft Rules of Procedure.¹³⁶ Thus, like the typical MLAT, neither Part IX of the Rome Statute nor the corresponding section of the Draft Rules of Procedure appears to offer adequate safeguards against privacy invasions.

Under Part IX, the prosecution (or the defense) seeking evidence or information located in the territory of a State Party (or in the possession of a non-party state), will request the Court to seek the assistance of that State in the acquisition of the required evidence. States Parties are obligated to cooperate fully with the Court regarding such a request,¹³⁷ whereas non-party States have no such treaty obligation.

Articles 86, 88, 93, 96, and 99 (which are contained in Part IX of the Rome Statute),¹³⁸ and article 69(8),¹³⁹ are relevant to the right to privacy in the

135. *Report of the Preparatory Committee*, *supra* note 68, para. 64. Drafters expressed contradictory views on means for state cooperation. Some delegations supported a cooperation framework "broadly similar to that existing between States on the basis of extradition and legal assistance agreements." Other delegations proposed:

that the [Rome] Statute should provide for an entirely new regime which would not draw upon existing extradition and legal assistance conventions, since the system of cooperation between the Court and States was fundamentally different from that between States, and extradition existed only between sovereign States. The obligation to cooperate imposed by the [Rome] Statute on States parties would not prevent the application of national laws in implementing such cooperation.

Id. Notably, a principal focus here was on extradition and surrender, and not on general human rights concerns. *Id.*

136. A typical MLAT requires that searches and seizures be executed in accordance with the laws of the Requested State. The Requested States' laws relating to the right to privacy might differ dramatically from similar laws in the Requesting State. In turn, both sets of laws might run afoul of an international standard (such as the Court would presumably apply in an ICC prosecution). Thus, the MLAT search and seizure provisions are helpful only to the extent that safeguards for rights exist in the laws of the requested state.

Another MLAT protection not provided in the Rome Statute is the requirement that the Requested State authorities, following execution of a request for search and seizure, certify to the Requesting State "the circumstances of the seizure, identity of the item seized and integrity of its condition, and continuity of possession thereof."

Finally, MLATs protect third parties, that appear to be unprotected by the Rome Statute. *See, e.g., U.N. Model Convention on Mutual Assistance in Criminal Matters*, G.A. Res. 117, U.N. GAOR, 45th Sess., Annex, U.N. Doc. A/RES/45/117 (1991) (providing for the protection of third party privacy and other rights in searches and seizures).

137. Rome Statute, *supra* note 3, art. 86.

138. Rome Statute, Part IX, consists of articles 86-102. The Part IX articles that are not discussed in this Article relate to matters other than the right to privacy in the search and seizure context, and include: article 87 (requests routing to States Parties through diplomatic channels; requests from non-party States and inter-governmental organizations; failure to comply with requests; articles 94 and 95 (postponement of execution of request regarding an ongoing investigation or prosecution and

search and seizure context. These articles deal primarily with States Parties' obligations to cooperate and assist in the Court's investigations and prosecutions. Though it may appear that these provisions, individually or variously combined, cover the search and seizure privacy right, and though the *travaux préparatoires* suggest that coverage is in place, such coverage appears to be at best limited and at worst non-existent.

Article 86 is a general call for cooperation by States Parties in all aspects of the Court's work, particularly as the Court investigates and prosecutes crimes.¹⁴⁰ It does not prescribe the manner in which that participation is to occur, except that States Parties are to cooperate "fully" and "in accordance with the provisions of this Statute."¹⁴¹ Therefore, article 86 arguably does not impose upon States Parties human rights compliance obligations imposed on the ICC under the Rome Statute (for example, the article 21(3) duties imposed on the ICC with respect to the law applied and interpreted by the Court). Arguably, article 21(3) would not directly apply to States' obligations to cooperate under article 86. Though article 86 would require States to ensure cooperation of all their authorities that could be called upon to assist (for example, federal police, local police, and the military), it does not expressly dictate that national authorities must abide by particular human rights standards. Article 86 contains no prescriptions related to a domestic or international obligation to safeguard the search and seizure privacy right, to any right to privacy standard, or indeed to any other right that might be deemed to be an internationally recognized human right. Furthermore, article 86 does not expressly demand that the law of the requested States Parties be consistent with internationally recognized human rights.

Article 88, which operates in conjunction with article 86,¹⁴² provides that States Parties shall ensure that national laws are in place to enable cooperation of the sort required under the Rome Statute as provided for in Part IX.¹⁴³ No search and seizure privacy right is expressly provided for in article

admissibility challenges); article 97 (State consultations with the Court regarding request compliance); article 98 (cooperation regarding immunity waiver and consent to surrender); and article 100 (costs of executing requests); article 101 (rule of speciality) and article 102 (use of terms—"surrender" and "extradition"). Other Part IX articles not discussed relate to privacy in the context of seizures of persons: article 89 (surrender of persons to the Court); article 90 (competing requests to extradite and surrender); article 91 (contents of arrest or surrender request); and article 92 (provisional arrest).

139. Though article 69(8) appears in Part VI of the Rome Statute, it is relevant to Part IX.

140. Rome Statute, art. 86 provides: "States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court."

141. Rome Statute, *supra* note 3, art. 86.

142. With regard to article 86, "[t]he simplest way of ensuring fulfillment of the obligation to cooperate is to provide national laws that allow (with due regard for the [Rome] Statute) requests from the Court to be passed to national authorities for execution in the same manner as a request from another country or as an order issued under national law." Bruce Broomhall, *The International Criminal Court: A Checklist for National Implementation in ASSOCIATION INTERNATIONALE DE DROIT PÉNAL*, 13^{TER} NOUVELLES ÉTUDES PÉNALES (M. Cherif Bassiouni ed., 1999), 113, 117. *Id.* at 118 (noting that article 88 contains an important corollary to the general obligation to cooperate under article 86).

143. Rome Statute, *supra* note 3, article 88, provides: "States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under [Part IX]." Article 88 requires national law procedures for cooperation only under Part IX, and

88. Article 88 envisages that the extant domestic laws of States Parties would be modified in order to comply fully with Part IX.¹⁴⁴ States are obligated to ensure compatibility of their domestic laws with Part IX, but are not expressly obliged to adopt any particular form of enactment to fulfill their obligations, and may legislate based on their legal and constitutional order.¹⁴⁵ Article 88 does not refer to a domestic or international privacy standard, and it does not expressly call for States to enforce the right to privacy, or to incorporate substantively that right into their law. Arguably, article 88 can be read to require States Parties to enact legislation that would call for search warrants or other procedural mechanisms for helping to ensure that the right to privacy is not violated. However, such an argument may fail, as the Rome Statute does not expressly call for search warrants. But if a search warrant or other prior judicial authorization requirement is a part of customary international law, is a general principle of law, or is an internationally recognized human right, then article 88 reasonably could be read to provide that States Parties are obligated to ensure such procedures are in place domestically.¹⁴⁶

Article 93, which does not expressly address privacy rights issues, mandates that States Parties, in accordance with Part IX and "under procedures of national law," must comply with requests to provide certain assistance.¹⁴⁷ Article 93 does not expressly mandate that States Parties

does not address national law under other parts of the Rome Statute.

Article 88 is both substantive and procedural in operation, but in neither sense expressly relevant to the search and seizure privacy right. States must enact laws that substantively agree (and that do not substantively disagree) with the Rome Statute. Procedurally, States must enact laws to facilitate cooperation with the ICC. Some of these laws enacted may touch on search and seizure/right to privacy issues (if, for example, the argument is made that article 88 calls for search warrants).

144. An examination of the text suggests that the Rome Statute negotiators were more concerned about States Parties' extradition or surrender laws that might conflict with the States' obligations under the Rome Statute. For example, some States' laws prohibit the extradition or surrender of their own nationals, which would conflict with Rome Statute obligations under articles 89-92. Rome Statute, *supra* note 3, arts. 89-92. Such States Parties would be obliged to modify their national laws to comply with the Rome Statute, since Article 88 necessarily envisages that the extant domestic laws of States Parties may need to be modified in order to comply with Part IX. *Id.*, art. 88; *see also Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume 1 (Proceedings of the Preparatory Committee during March-April and August 1996)*, para. 310, G.A., 51st Sess., Supp. No. 11, A/51/22 (1996) ("[T]here would be instances in which a State must amend its national law in order to be able to meet those [state cooperation] obligations.") Indeed, States Parties may be required to enact new laws and procedures to be in compliance with Rome Statute, article 88.

145. *See Broomhall, supra* note 142, at 119. Dr. Broomhall notes that States Parties have several options to ensure that procedures needed under national law for forms of cooperation under Part IX are available to satisfy article 88. Methods depend on the State Party and its laws, but include: automatic incorporation of international agreements into domestic law; international agreement; a systematic review of domestic law for Rome Statute compatibility; adoption of implementing legislation; and domestic mutual legal assistance legislation.

146. *See discussion infra* Subsection VI.C.5-6 (discussing whether the search and seizure right to privacy has risen to customary international law and general principle of law status).

147. Rome Statute, *supra* note 3, article 93, in relevant part provides:

State Parties shall, in accordance with the provisions of [Part 9] and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions:

- (a) The identification and whereabouts of persons or the location of items;
- (b) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court;

conform their substantive domestic law to international standards, but provides that States, “in accordance with the provisions of [Part IX] and under procedures of national law” shall comply with requests to provide assistance in a list of enumerated situations. Article 93 does not explicitly address the situation where a State Party’s domestic law on the right to privacy does not rise to the level required under the Rome Statute.¹⁴⁸ Although article 93 provides that states “shall . . . under procedures of national law” provide assistance in “[t]he execution of searches and seizures,”¹⁴⁹ there is no express requirement that international norms be applied. Furthermore, it does not expressly address a search and seizure privacy standard, either domestic or international.

Although the Preparatory Committee discussed and subsequently rejected a mechanism for determining whether evidence transferred to the Court pursuant to Part IX “had been obtained in accordance with national rules,”¹⁵⁰ the drafters rejected the proposal that the “Court has, in case of evidence obtained by national authorities, to presume irrebuttably that the national authorities acted in accordance with the domestic provisions.”¹⁵¹ Even if an express mechanism for evaluating improperly obtained evidence had been enacted, such a provision may have been limited to the question of whether evidence was obtained in violation of the national laws, regardless of whether those laws themselves complied with ICC law or with international human rights law.

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- (g)
The examination of places or sites, including the exhumation and examination of grave sites;
 - (h)
The execution of searches and seizures;
 - (k)
The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; and
 - (l)
Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.

Rome Statute, *supra* note 3, art. 93(1).

148. See discussion *infra* Subsection VI.C.5.a (discussing international human rights law as a part of “applicable law” under Rome Statute, article 21). An example of differential standards can be drawn from bilateral MLATs. For example, under typical MLATs between the United States and another country (“Country X”), a search or seizure request by Country X to the United States must be supported by probable cause for the search or seizure. If the United States requests a search or seizure from Country X, the United States need not necessarily show probable cause, but must show the requisite level of proof required under the law of Country X for search and seizures there, even though that level of proof might be greater or less than probable cause. See Ellis & Pisani, *supra* note 125, at 403-25.

149. Some might argue that other items in the article 93(1) list might present issues related to the right to privacy. For example, article 93(1)(g) deals with the “examination of places or sites, including the exhumation and examination of grave sites.” Though privacy interests might be implicated in the carrying out of a request related to such examinations, it seems unlikely that such requests would implicate privacy interests (as described in this Article) unless the “places or sites” were the home or business of a suspect or an accused, or the exhumations and grave site investigations were conducted at a home or business of a suspect or an accused.

150. Report of the Preparatory Committee, *supra* note 68, para. 289.

151. Zutphen Draft Statute, *supra* note 68, art. 62[44][69](6).

Although article 93(3) limits mandatory cooperation requirements where the requested assistance "is prohibited in the requested State on the basis of an existing fundamental legal principle of general application," this limitation does not explicitly address the right to privacy, which would be implicated in an "internationally recognized human right" analysis but which may not be considered in a "fundamental legal principle of general application" analysis. Finally, article 93 does not expressly require State law consistency with "internationally recognized human rights."

Article 96 appears to offer limited privacy coverage in the international cooperation and judicial assistance context. Article 96 provides that all requests referred to in article 93 shall be in writing, and outlines required contents of the requests.¹⁵² The writing requirement will help to ensure that appropriate records are kept, which may lessen the risk of arbitrary, unlawful, or unreasonable searches and seizures and may encourage authorities to be more accountable for their practices. However, the requirement regarding the content of the written request does not expressly address search and seizure privacy right concerns. Although article 93 outlines the type and level of detail required in a request for assistance—including a statement of purpose, the whereabouts of sought persons or places to be found or identified, the facts underlying the request, and such information as may be required under the requested States Party's national law—article 96(2) fails to classify the right to privacy as an "internationally recognized human right." Thus, a requirement exists that the Court provide certain specific information to the State Parties before States act upon the request. However, article 96 does not appear to provide adequate safeguards against unreasonable, unlawful or arbitrary searches and seizures.

Article 99 provides that Court requests for assistance shall be executed in accordance "with the relevant procedure under the law of the requested

152. Rome Statute, *supra* note 3, art. 96, provides:

1) A request for other forms of assistance referred to in article 93 shall be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel provided for in article 87, paragraph 1(a).

2) The request shall, as applicable, contain or be supported by the following:

- (a) A concise statement of the purpose of the request and the assistance sought, including the legal basis and the grounds for the request;
- (b) As much detailed information as possible about the location or identification of any person or place that must be found or identified in order for the assistance sought to be provided;
- (c) A concise statement of the essential facts underlying the request;
- (d) The reasons for and details of any procedure or requirement to be followed;
- (e) Such information as may be required under the law of the requested State in order to execute the request; and
- (f) Any other information relevant in order for the assistance sought to be provided.

3) Upon request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2(e). During the consultations, the State Party shall advise the Court of the specific requirements of its national law.

4) The provisions of this article shall, where applicable, also apply in respect of a request for assistance made to the Court.

State and, unless prohibited by such law, in the manner specified in the request”¹⁵³ Thus, article 99 likewise apparently fails adequately to cover the search and seizure privacy right because it merely reconfirms the notion that “national law” is to be followed in the execution of requests by States. Article 99, like articles 93 and 96, fails expressly to require that States Parties conform their national law to international standards. Article 99 fails to illuminate the contours of an appropriate domestic or international right to privacy in the search and seizure context,¹⁵⁴ and does not expressly require consistency with “internationally recognized human rights.” Furthermore, as is clear from article 69(8), no mechanism exists whereby the ICC can rule on the validity or application of domestic law.¹⁵⁵

Article 69(8), which is found in Part VI, offers no express privacy coverage. Article 69(8) operates in recognition of state sovereignty, and provides that the Court is not to rule on the “application of the State’s national law” when deciding on the relevance or admissibility of evidence.¹⁵⁶ Thus, when determining whether evidence acquired through State cooperation is admitted against an accused person, the Court arguably may not consider whether that State, in acquiring the evidence, complied with its own domestic substantive or procedural law, or indeed whether that national law was in accord with international human rights law.¹⁵⁷ A great potential for domestic abuse arises with little if any ICC recourse unless, as this Article argues, the Rome Statute incorporates a search and seizure privacy right consistent with internationally recognized human rights.

The drafters rejected proposals for the Court to be empowered to determine whether evidence was gathered in accordance with national rules,

153. Rome Statute, *supra* note 3, article 99(1), provides:

Requests for assistance shall be executed in accordance with the relevant procedure under the law of the requested State and, unless prohibited by such law, in the manner specified in the request, including following any procedure outlined therein or permitting persons specified in the request to be present at and assist in the execution process.

154. Article 99 envisions the Prosecutor executing a request by the Court in a State when “the successful execution of a request . . . can be executed without any compulsory measures, including specifically the interview of or taking evidence from a person on a voluntary basis . . . [and] the examination without modification of a public site or other public place,” subsequent to “consultations with the requested State Party.” See Rome Statute, *supra* note 3, arts. 99(4), 99(4)(a), and 99(4)(b).

155. See *infra* note 156.

156. Article 69(8), which appears in Part 6 of the Rome Statute, provides: “When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State’s national law.” Rome Statute, *supra* note 3, art. 69(8). Furthermore, Draft Rule of Procedure, rule 63(5), provides: “The Chambers shall not apply national laws governing evidence, other than in accordance with article 21.” Draft Rules of Procedure, *supra* note 5, rule 63(5). Thus, when the Court is faced with evidence obtained in violation of national law, the Court is forbidden from interpreting and applying that national law in determining whether the evidence should be excluded from trial. Arguably, this provision might suggest that if the evidence is acquired in compliance with national law, but in contravention of internationally recognized human rights, then the national law is deemed irrelevant and the Rome Statute safeguards will apply.

157. This is not unlike the rule applied in the International Criminal Tribunal for the Former Yugoslavia Tribunal case of Prosecutor v. Mucic, Case No. IT-96-21, Decision on the Tendering of Prosecution Exhibits 104-108 (Trial Chamber, Nov. 16, 1998; Feb. 9, 1998), in which the tribunal ruled that it was not bound by Austrian law, and would not take the domestic law into consideration when deciding whether to exclude evidence seized following a search that violated Austrian law.

in part because of the belief that "the Court should not get involved in intricate inquiries about domestic laws and procedures and it should rather rely on ordinary principles of judicial cooperation."¹⁵⁸ The drafters concluded that the Court "should apply international law and should exclude, for example, evidence obtained in violation of fundamental human rights, or minimum internationally acceptable standards (such as the Guidelines of the United Nations Congress on Prevention of Crime and Treatment of Offenders), or by methods casting substantive doubts on its reliability."¹⁵⁹ The article 69(7) exclusionary rule, as crafted, may not adequately cover the search and seizure right to privacy.¹⁶⁰

Exempting States' laws from ICC review is inconsistent with the Rome Statute's other rules related to state cooperation. This is particularly so given that article 88 requires State Parties to ensure that procedures are in place under national law for all forms of cooperation specified in the Rome Statute,¹⁶¹ that article 93 requires states parties "under procedures of national law [to] comply with requests by the Court to provide . . . assistance,"¹⁶² and that article 96 prescribes written contents of requests for cooperation.¹⁶³ Furthermore, the exemption of States' laws from ICC review would highlight a Court weakness in an area fundamental to the preservation of rights of accused persons. Such an exemption would generally limit the accused's ability to challenge admissibility of evidence based on violations of national substantive or procedural law, irrespective of whether that national law is more or less stringent than international standards that bind the ICC.¹⁶⁴ Finally, article 69(8) does not expressly require that the Court ensure that cooperation was obtained in a manner consistent with "internationally recognized human rights."

Articles 86, 88, 93, 96, 99 and 69(8) do not expressly protect the right to privacy in the context of searches and seizures. Any finding of such coverage must be inferred or derived from those articles, from other Rome Statute or collateral instrument provisions, or from a combination thereof. Since Part IX arguably fails to provide adequate search and seizure safeguards, we now must turn to "applicable law" in the search for privacy protection in the Rome Statute and its corollary instruments.

158. *Report of the Preparatory Committee*, *supra* note 68, para. 289. The drafters also suggested that "the Court, in cases of allegations of evidence obtained by national authorities by illegal means, could decide on the credibility of the allegations and the seriousness of 'violations'." *Id.* But, there was no direct suggestion as to how the Court would respond if the allegations were credible and the "violations" (which appears in quotation marks in the original) were serious. *See id.*

159. *Id.*

160. *See generally* discussion *supra* Section IV.C (discussing deficiencies of Rome Statute, art. 69(7) exclusionary rule).

161. Rome Statute, *supra* note 3, art. 88

162. *Id.*, art. 93.

163. *Id.*, art. 96.

164. Even though rule 63(5) of the Draft Rules of Evidence directs the Court back to Rome Statute, article 21(1)(c), that section of article 21 calls for derivation of general principles, and does not expressly call for an ICC judicial interpretation of whether a particular state's search and seizure laws have been violated. In fact, the Court is prohibited from ruling on "the application of the State's national law." *Id.* note 3, art. 69(8).

V. TREATY INTERPRETATION UNDER THE VIENNA CONVENTION ON THE LAW OF TREATIES

The basic rules of treaty interpretation, as contained in the Vienna Convention on the Law of Treaties,¹⁶⁵ provide a framework for locating the search and seizure privacy right within the applicable law of Rome Statute, article 21, or elsewhere within the ICC framework. The Vienna Convention, which codifies customary international law governing international agreements,¹⁶⁶ comprises a set of authoritative rules of treaty interpretation that are followed by most States, including States that are not party to the Vienna Convention.¹⁶⁷ Since the Rome Statute is a treaty under the Vienna Convention definition, Vienna Convention rules may be employed to interpret Rome Statute terms, including those related to the existence and scope of search and seizure privacy rights.¹⁶⁸

The Vienna Convention incorporates the three principal canons for treaty term interpretation: (1) the objective approach; (2) the subjective approach; and (3) the teleological approach.¹⁶⁹ The objective approach

165. Vienna Convention, *supra* note 16. Pursuant to the Rome Statute, article 21, the ICC shall apply the Vienna Convention as an "applicable treaty," *see* discussion *infra* Subsection VI.C.4, or as customary international law, *see* discussion *infra* Subsection VI.C.5.

166. The Vienna Convention embodies customary international law either because the treaty itself codified customary international law or because principles contained within the treaty have since risen to the level of customary international law. *See, e.g.*, LOUIS HENKIN, RICHARD CRAWFORD PUGH, OSCAR SCHACHTER, & HANS SMIT, *INTERNATIONAL LAW: CASES AND MATERIALS* 416-18 (3d ed. 1993); John Norton Moore, *Enhancing Compliance with International Law: A Neglected Remedy*, 39 VA. J. INT'L L. 881 (1999). For the U.S. position, *see generally* 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS 145 (1987) ("This Restatement accepts the Vienna Convention as, in general, constituting a codification of the customary international law governing international agreements, and therefore as foreign relations law of the United States even though the United States has not adhered to the Convention.").

167. The United States is a good example of a Vienna Convention non-party that subscribes to Vienna Convention principles. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS 145 (1987). In June 2000, the United States, in its submission to the ICC Preparatory Commission on a proposed rule to be incorporated into the Draft Rules of Procedure, noted the relevance of the Vienna Convention rules to the Rome Statute. *See Proposal submitted by the United States of America concerning rules of procedure and evidence relating to Part 13 of the Statute (Final Clauses)*, U.N. Doc. PCNICC/2000/WGRPE(13)/DP.1 (2000) (suggesting that regarding amendments to the Rome Statute, a particular Vienna Convention rule would not apply if the Rome Statute "otherwise provides").

168. Vienna Convention, *supra* note 16, art. 1(a) ("['T]reaty' means an international agreement concluded between States in written form and governed by international law."). It should be noted that non-Vienna Convention rules of interpretation may be used in interpreting portions of the Rome Statute, for example, criminal culpability provisions, which should be construed narrowly.

169. *See generally* IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 626-32 (4th ed. 1990) (discussing interpretation of treaties); HENKIN ET AL., *supra* note 166 at 471-81 (discussing interpretation of treaties); HENRY G. SCHERMERS & NIELS M. BLOKKER, *INTERNATIONAL INSTITUTIONAL LAW* §§ 1344, 1344-1389 (3d rev. ed. 1999) (discussing interpretation and settlement of treaty disputes, and noting that "[w]hoever applies a rule must first also interpret it, which of course requires ascertaining its meaning."); IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* (1973) (discussing interpretation of treaties). A fourth canon might be called the "quasi-textual approach," which is similar to the objective, textual approach, in that they both regard the "text as the essence of an agreement." However, rather than interpreting words according to their ordinary or plain meaning, "the quasi-textual approach seeks to interpret them in the manner the parties intended." Kenneth J. Vandeveld, *Treaty Interpretation from a Negotiator's Perspective*, 21 VAND. J. TRANSNAT'L L. 281, 289 (1988).

demands that ambiguities be interpreted in accordance with the ordinary, plain meaning of the words of the treaty. In this approach, the text, including other "intrinsic" documents, such as the preamble and annexes, maintain primacy over any subsidiary sources of clarification,¹⁷⁰ since the text represents an authentic expression of the parties' agreement. The subjective approach looks to the actual or presumed intent of the drafters,¹⁷¹ while the teleological approach requires exploration of the object and purpose of the treaty as a subsidiary means for interpreting intrinsic and extrinsic materials.¹⁷² The three approaches are not mutually exclusive and are not meant to be applied in a hierarchical fashion.¹⁷³ Indeed the Vienna Convention integrates their application and supports a dynamic concurrent examination and review of intrinsic and extrinsic materials.¹⁷⁴ This Article uses these three approaches to analyze the relevant portions of the Rome Statute.

A. *Article 31 of the Vienna Convention: Rules & Application to the Rome Statute*

Article 31 of the Vienna Convention encompasses the objective, subjective and teleological approaches to treaty interpretation. It employs the objective approach by directing that a treaty be interpreted in good faith "in accordance with the ordinary meaning to be given to the terms of the treaty."¹⁷⁵ Article 31 applies when an existing treaty term is ambiguous or

170. See SCHERMERS & BLOKKER, *supra* note 169, § 1347 ("Priority is usually given to the text." (citing, *inter alia*, Sir Humphrey Waldock, *Third Report on the Law of Treaties*, Y.B. INT'L L. COMM'N. 53, 54 (1964)). This textual approach might direct analysts to dictionaries, in search of the denotation of terms.

171. This approach would subject to scrutiny ancillary documents, such as a treaty conference's preparatory work (*travaux préparatoires*), to help discern the intent of the parties, which will aid in the treaty term interpretation. Under this approach, the treaty text and the *travaux préparatoires* operate on the same level, in that both are used to help discern the parties' intent. See HENKIN ET AL., *supra* note 166, at 471-81.

172. *Id.* at 477; BROWNLIE, *supra* note 169, at 3.

173. The World Trade Organization recently addressed the rule that "the elements referred to in Article 31—text, context and object-and-purpose as well as good faith—are to be viewed as one holistic rule of interpretation rather than a sequence of separate tests to be applied in a hierarchical order." *World Trade Organization Panel Report on United States—Sections 301-310 of the Trade Act of 1974 (Findings and Conclusions)*, WT/DS152/R (Dec. 22, 1999), 39 I.L.M. 452, § 7.22 (2000) (quoting *Appellate Body Report on Japan—Taxes on Alcoholic Beverages*, WT/DS8/AB/R (1996), at 11-12).

174. The International Law Commission, which drafted the original article 31, commented:

The Commission, by heading the article "General Rule of Interpretation" in the singular and by underlining the connexion between paragraphs 1 and 2 and again between paragraph 3 and the two previous paragraphs, intended to indicate that the application of the means of interpretation in the article would be a single combined operation. All the various elements, as they were present in any given case, would be thrown into the crucible and their interaction would give the legally relevant interpretation. Thus [Article 31] is entitled "General rule of interpretation" in the singular, not "General rules" in the plural, because the Commission desired to emphasize that the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule.

2 YEARBOOK OF THE ILC 219, 219-20 (1966) (emphasis in original).

175. Vienna Convention, *supra* note 16, article 31 provides:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

unclear. There would be no reason to look beyond the treaty's words if those words admit of only one construction.¹⁷⁶ Analyzing the "ordinary meaning" of a treaty term involves assessing that term in its "context," which, pursuant to article 31(2)(a), includes intrinsic materials, such as the treaty text, and its preamble and annexes, along with any treaty-related, collateral agreement reached by the parties in connection with the treaty's conclusion.¹⁷⁷ Article 31(1) authorizes use of the teleological approach to shed light on the ordinary meaning, which is to be interpreted in accordance with the treaty's "object and purpose." The object and purpose do not operate as an independent vehicle for interpretation, but serve in an ancillary capacity. Finally, Article 31(4) approves of the subjective approach, in providing that a "special meaning shall be given to a term if it is established that the parties so intended."¹⁷⁸ Thus, according to the principles of the Vienna Convention,¹⁷⁹ one would look to the Rome Statute itself (including its Preamble), its Final Act, and instruments called for in the Final Act, such as the ICC Rules of Procedure and the ICC Elements of Crimes, in search of ordinary meaning, context, object, and purpose.

Regarding the ordinary meaning and context of the treaty, none of the relevant ICC collateral instruments—including the Rome Statute, the Final Act, the Draft Rules of Procedure, and the Draft Elements of Crimes—directly and unambiguously provides for the right to privacy in the context of searches

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

- (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
- (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

176. Corollaries are that article 31 may not be used to interpret a non-existent term, may not apply in attempting to fill in gaps, and may not apply in attempting to determine whether an implied treaty term exists.

177. Article 31(2)(b) of the Vienna Convention will not be analyzed in this Article in the context of the Rome Statute.

178. Article 31(4) of the Vienna Convention is pertinent in that various terms of the Rome Statute might be construed as having been given a special meaning by the drafters. Among those terms are "internationally recognized human rights" as contained in articles 21(3) and 69(7), and "universally recognized" as contained in article 7(h). Rome Statute, *supra* note 3, arts. 7(h), 21(3), 69(7). A heavy burden exists to show that any such special meaning was intended by the parties.

179. Some commentators would discourage using the Vienna Convention rules to interpret the Rome Statute, arguing that those rules are not suited for a treaty of this type. *See, e.g.,* William K. Lietzau, *Checks and Balances and Elements of Proof: Structural Pillars for the International Criminal Court*, 32 CORNELL INT'L L.J. 477, 484 (1999) (recourse to negotiating history "will yield little dispositive guidance appropriate for a criminal courtroom").

and seizures.¹⁸⁰ Thus, arguably, there is nothing to interpret: the intrinsic documents would be deemed to speak clearly through their silence. However, several terms in the Rome Statute can admit of a construction that encompasses privacy rights, and it is those terms (such as “internationally recognized human rights,” “fundamental rights,” and “universally recognized”) that must be analyzed according to their ordinary meaning in their context in light of the object and purpose of the treaty.¹⁸¹

Arguably, no express search and seizure privacy right is found within the object and purpose of the Rome Statute. The objects and purposes of the Rome Statute, according to its Preamble,¹⁸² include:

[1] to put an end to impunity for the perpetrators of [the most serious crimes of concern to the international community] and thus to contribute to the prevention of such crimes;

[2] for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community; and

[3] to guarantee lasting respect for the enforcement of international justice.¹⁸³

Though the Preamble reaffirms the principles of the U.N. Charter, which endorse international human rights, it does not expressly state that human rights safeguards are an object or purpose of the Rome Statute. To the extent that the object or purpose of the treaty expressly focuses on rights at all, it can be argued, the focus appears to be on the rights of society and victims, and not on the privacy or other rights of suspects or accused persons. U.N. officials,

180. Together with the context, also to be taken into account for treaty interpretation is any subsequent agreement among the parties regarding interpretation (for example, future decisions of the Assembly of States Parties, the adoption of the Rules of Procedure) and any subsequent practice which establishes the agreement of the parties regarding its interpretation. See Vienna Convention, *supra* note 16, arts. 31(3)(a)-(b). This is particularly important in the context of the ICC and the right to privacy, as the practice of the Court enforcing the right to privacy may establish agreement (express or implied) regarding the interpretation of the right under the Rome Statute.

Finally, also relevant is Vienna Convention, article 31(3)(c), which mandates the taking into account, together with the context, any relevant rules of international law “applicable” in the relations between the parties. Vienna Convention, *supra* note 16, art. 31(3)(c). This is significant because not only does Rome Statute, article 21 dictate that the Court shall apply certain international law rules, but also because Vienna Convention, article 31(3)(c) directs the Court in interpreting the Rome Statute to apply the full corpus of international law, including customary international law, general principles of law, international human rights law, international humanitarian law, and any other law that falls under the umbrella of “international law.” See discussion *infra* Part VI.

181. See discussion *infra* Section VI.C (interpreting and applying “applicable law”).

182. The object and purpose of the Rome Statute, as stated in the Preamble, mimic the objects and purposes of the ICTY and the ICTR, as outlined by the 1953 ILC Draft Statute drafters and commentators, and as asserted by Professor Bassiouni. Professor Bassiouni, Chairperson of the Rome Conference Drafting Committee of the Rome Statute, stated the “purposes of the ICC include: dispensing exemplary and retributive justice; providing victim redress; recording history; reinforcing social values; strengthening individual rectitude; educating present and future generations; and, more importantly, deterring and preventing future human depredations.” THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *supra*, note 60, at 1-2 (citations omitted).

183. *Id.* Secretary-General Kofi Annan also has stated that the “overriding interest” of the Rome Statute is that of the victims. *UN Secretary-General*, *supra* note 1.

governmental agents, NGO representatives, and others repeatedly emphasized that an object and purpose of the Rome Statute was to bring justice to the perpetrators. For example, Secretary-General Kofi Annan emphasized the traditional objects and purposes of a court with international criminal jurisdiction when he stated that people all over “the world want to know that humanity can strike back—that wherever and whenever genocide, war crimes or other such violations are committed, there is a court before which the criminal can be held to account; a court that puts an end to a global culture of impunity.”¹⁸⁴ Mary Robinson, the U.N. High Commissioner for Human Rights (UNHCHR),¹⁸⁵ also failed to speak out on behalf of the rights of suspects or accused persons. Instead, she addressed human rights protections for victims through her statement: “When I am asked what an International Criminal Court would do, I have a very simple answer. It would fight impunity.”¹⁸⁶ Even the major international human rights non-governmental organizations that addressed the Rome Conference Plenary did not stress human rights for suspects or accused persons. Kenneth Roth, the Chairperson of Human Rights Watch (HRW), did not mention human rights in his opening statement, though Norman Dorsen, the Chairperson of the Lawyers Committee for Human Rights (LCHR), did list adherence “to the highest international standards of fair trial and due process” as a priority.¹⁸⁷

Though the objects and purposes of the Rome Statute may appear to ring clearly,¹⁸⁸ the human rights of suspects or accused persons are not ignored. It could still be argued that the objects and purposes cover human rights for suspects and the accused, particularly because of the broad-sweeping human rights announced in Rome Statute, articles 21, 55, 66 and 67.

184. *UN Secretary-General Declares*, *supra* note 1.

185. Mrs. Robinson was not a delegate at the Rome Conference, but was an invited speaker at the Plenary, representing the Office of the High Commissioner for Human Rights. *Summary Record of the 2d Plenary Meeting*, ¶¶ 98-101, U.N. Doc. A/Conf.183/SR.2 (1998).

186. Mrs. Robinson also said: “These are just a few of my concerns. My Office has prepared a detailed policy paper for circulation at this conference setting out our considered views on a number of important human rights issues.”

187. Mr. Dorsen’s speech, delivered on June 18, 1998, is available at <http://www.un.org/icc/index.htm> (last visited May 21, 2001). Mr. Roth’s speech is available at that same site and at Human Rights Watch, June 18, 1998, at <http://www.hrw.org/campaigns/icc/docs/icc-ken.htm> (last visited May 15, 2001). Though Human Rights Watch, the Lawyers Committee for Human Rights, and other NGOs may have vociferously advocated on behalf of some rights of suspects and the accused, the interests of society as a whole, and of victims, were seemingly deemed paramount.

188. Most delegations presented opening remarks during the Plenary. The overwhelming majority of those remarks did not refer to the rights of suspects or of the accused. *See generally Summary Record of the 2nd Plenary Meeting*, U.N. Doc. A/Conf.183/SR.2 (1998); *Summary Record of the 3rd Plenary Meeting*, U.N. Doc. A/Conf.183/SR.3 (1998); *Summary Record of the 4th Plenary Meeting*, U.N. Doc. A/Conf.183/SR.4 (1998); *Summary Record of the 5th Plenary Meeting*, U.N. Doc. A/Conf.183/SR.5 (1998); *Summary Record of the 6th Plenary Meeting*, U.N. Doc. A/Conf.183/SR.6 (1998); *Summary Record of the 7th Plenary Meeting*, U.N. Doc. A/Conf.183/SR.7 (1998); *Summary Record of the 8th Plenary Meeting*, U.N. Doc. A/Conf.183/SR.8 (1998).

B. *Article 32 of the Vienna Convention: Rules & Application to the Rome Statute*

Article 32 of the Vienna Convention instructs on the permissibility of reaching outside the four corners of the treaty for purposes of treaty interpretation.¹⁸⁹ It provides that when the ordinary meaning of a term leads to ambiguity or would produce a "manifestly absurd or unreasonable result," one may look to supplementary means of interpretation, including the *travaux préparatoires*, and the circumstances of the treaty's conclusion. Thus, per article 32, it would be appropriate to examine the *travaux préparatoires* to help determine whether the right to privacy in the search and seizure context is an "internationally recognized human right."

Although undefined in the Vienna Convention, *travaux préparatoires* generally refer to documentation of the treaty-drafting process and includes official negotiations among the participating states.¹⁹⁰ It arguably includes documentation based on observations and participation of delegates.¹⁹¹ As several critical terms of the treaty are ambiguous and admit of different constructions, it is permissible, if not necessary, to seek guidance from the *travaux préparatoires*. Among those terms which require interpretation are: "internationally recognized human rights" and "universally recognized human rights," which will be examined below in the context of the discussion of "applicable law" under Rome Statute, article 21.¹⁹²

VI. "APPLICABLE LAW": ARTICLE 21

A. *Article 21: Drafting History*

Article 21 enumerates the sources of all ICC law, including not only substantive and procedural criminal law, but also all "international law" and

189. Vienna Convention, *supra* note 16, article 32 provides:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.

190. B.N. Mehrish, *Travaux Préparatoires as an Element in the Interpretation of Treaties*, 11 I.J.I.L. 39-88 (1971); Waldock, *supra* note 170; *Ambatielos (Greece v. U.K.)*, 1952 I.C.J. 28, 45 (July 1); *Rights of Nationals of the United States in Morocco (Fr. v. U.S.)*, 1952 I.C.J. 176, 209 (Aug. 27).

191. Some would argue that the *travaux préparatoires* can only consist of official documentation, as otherwise the door would be open for fraudulent assertions of what transpired during the negotiations. Like news reports, the unofficial documents are unchecked for accuracy by the delegates. The Final Act of the Rome Conference identified the recording of the Rome Conference deliberations as follows: "On the basis of the deliberations recorded in the records of the Conference (A/CONF.183/SR.1 to SR.9) and of the Committee of the Whole (A/CONF.183/C.1/SR.1 to SR.42) and the reports of the Committee of the Whole (A/CONF.183/8) and of the Drafting Committee (A/CONF.183/C.1/L.64, L.65/Rev.1, L.66 and Add.1, L.67/Rev.1, L.68/Rev.2, L.82-L.88 and 91), the Conference drew up the Rome Statute of the International Criminal Court." Rome Statute, *supra* note 3, Final Act. However, it is abundantly clear that voluminous written material, and oral discussions were not memorialized in the conference records referred to in the Final Act. *See id.*

192. *See discussion infra* Subsection VI.C.1.

any other law to be used by the Court in carrying out its judicial functions.¹⁹³ Recognizing that international law is dynamic and always evolving,¹⁹⁴ the Rome Statute drafters noted the impracticality of precisely delineating within the Rome Statute or its collateral instruments every principle and rule of law to be used by the Court. They arguably saw a need for flexibility, while incorporating precision and certainty in identifying the applicable law to be used. Therefore, a balance was struck between a full exposition and a flexible approach, resulting in a list of sources of law, identified in articles 21(1) and 21(2), as constrained by article 21(3) in their interpretation and application.¹⁹⁵

The applicable law list in articles 21(1) and 21(2) was not arrived at lightly. Multiple iterations of the list appeared in the earliest documents relied upon by those participating in the ICC negotiating process.¹⁹⁶ Those documents included, but were not limited to, drafts of the Rome Statute, with numerous proposals tendered formally and informally at various Pre-Rome Conference meetings and at Rome Conference sessions of the Committee of the Whole, Working Groups, informal groups, and "informal informal" groups.

B. *Article 21: As Adopted*

Article 21 provides that all law to be applied by the Court to resolve all issues is to be drawn from seven sources of "applicable law" listed within article 21.¹⁹⁷ The sources are listed hierarchically, in a manner reminiscent of

193. It appears that during article 21's drafting, more debate focused on sources of applicable law as related to resolving substantive criminal law issues than on the sources of applicable law generally considered to relate to resolving procedural criminal law issues.

194. See, e.g., Rome Statute, *supra* note 3, art. 10 ("Nothing in this Part [of the Rome Statute] shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than [the Rome] Statute.").

195. Rome Statute, *supra* note 3, arts. 21(1)-(3).

196. For a comprehensive analysis of the drafting history of Rome Statute, article 21, see George E. Edwards, *The Sources of Law of the Rome Statute of the Permanent International Criminal Court: The Tortured Drafting History* (forthcoming Autumn 2001) (tracing Rome Statute, article 21 iterations appearing in the 1951 and 1953 ILC Draft Statutes and the 1994 ILC Draft Statute, and in official and unofficial Rome Conference documents).

197. Rome Statute, *supra* note 3, article 21 provides, in full:

1. The Court shall apply:

(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin,

the sources of international law contained in article 38 of the Statute of the International Court of Justice.¹⁹⁸ Thus, the applicable law is to be consulted in the following order: (1) the Rome Statute itself;¹⁹⁹ (2) the Elements of Crimes;²⁰⁰ (3) the Rules of Procedure;²⁰¹ (4) "where appropriate, applicable treaties;"²⁰² (5) "where appropriate . . . the principles and rules of international law, including the established principles of the international law of armed conflict;"²⁰³ (6) "general principles of law derived by the Court from national laws of legal systems of the world;"²⁰⁴ and (7) "principles and rules of law as interpreted" in previous Court decisions.²⁰⁵ The Court is instructed to begin with the first-listed source and proceed to a lower-ranked source only if the first source proves inadequate, until the Court identifies the appropriate law to resolve the issue at hand.

Pursuant to article 21(3), as the ICC interprets and applies "applicable law" under articles 21(1) and 21(2), it must ensure that the law's application and interpretation is consistent with "internationally recognized human rights," with no improper adverse distinction drawn. When the Court resolves a legal issue, it must identify the "applicable law" from the article 21 sources list before determining the "consistency question." Defining and examining each of the prospective sources of applicable law contained in articles 21(1) and 21(2) will facilitate determining which of the sources will be applied by the Court when faced with a search and seizure privacy right question.

C. *Interpretation & Application of "Applicable Law"—Seeking Search and Seizure Privacy Rights*

When the Rome Statute enters into force, questions will arise regarding search and seizure privacy rights. If a suspect, an accused, or other person alleges that his right has been violated in the context of an ICC proceeding, the Court must determine whether the right is expressly or implicitly provided for, the scope of the right, whether the right has been violated, and an appropriate remedy.

wealth, birth or other status.

198. Though similarities exist between article 38 of the Statute of the International Court of Justice and article 21 of the Rome Statute, distinctions have been drawn by commentators, including by Secretary of the Committee of the Whole, Mahnouch H. Arsanjani: "Even though the three categories were inspired by Article 38 of the Statute of the International Court of Justice, they are substantially and structurally different from that article." Arsanjani, *supra* note 70, at 28.

199. Rome Statute, *supra* note 3, art. 21(1)(a).

200. *Id.*

201. *Id.*

202. *Id.*, art. 21(1)(b).

203. *Id.*

204. *Id.*, art. 21(1)(c). That Article further directs the Court to apply "as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards."

205. *Id.*, art. 21(2). Presumably, the principles and rules applied under article 21(2) in any given prosecution will be principles and rules that the Court had previously applied per article 21 in earlier proceedings.

In resolving legal questions that arise, such as the existence and scope of a right under the ICC, the Court will turn to article 21 for direction on identifying the specific rules of law needed to resolve the issue.²⁰⁶ If the Rome Statute, as the first listed source, does not provide an appropriate rule, the Court will examine, in descending order, the remaining applicable sources of law under article 21 in search of a governing rule or principle. If the Court finds the search and seizure right to privacy incorporated into the Rome Statute itself, as this Article contends it should, the Court would then not need to examine the remaining six sources of applicable law. However, it is instructive, particularly should the Court not find the search and seizure privacy right in the Rome Statute itself, to examine the remaining six sources of applicable law in search of the right. This Article concludes that the search and seizure privacy right can and should be found in each of the seven sources of applicable law: the Rome Statute; the ICC Elements of Crimes; the ICC Rules of Procedure; applicable treaties; principles and rules of international law; general principles of law derived from national law of legal systems of the world; and principles and rules of law as interpreted in prior decisions.

1. *Source of Applicable Law # 1: Rome Statute, Article 21(1)(a)*

Those who oppose a finding of the search and seizure right to privacy in the Rome Statute or collateral instruments may argue (1) that the right does not exist within the ICC framework since that right is not expressly provided for in the Rome Statute or other collateral instruments; (2) that a laundry list of rights is expressly provided for in the Statute, and this right is not included (the *inclusio unius est exclusio alterius* argument); and (3) that the express right was deliberately deleted from the Final Draft Statute during the Rome Conference.²⁰⁷

206. Rome Statute, article 21 does not delineate the actual rules or principles that will serve as the basis of a substantive judgement or that govern a particular legal dispute. Article 21 merely directs the Court where to look for the relevant substantive or procedural principle or rule. ASSOCIATION INTERNATIONALE DE DROIT PÉNAL, *supra* note 72, at 36-38.

207. The drafters could have expressly incorporated the search and seizure privacy right either generally, or in detail, directly into the Rome Statute or any of the collateral instruments. If the drafters' rationale for excluding the right was the difficulty in defining it, they could have chosen: to define or elaborate the right in a collateral instrument; to assign the Preparatory Commission the task of defining the right (as that body was charged with elaborating confidentiality privileges), Rome Statute, *supra* note 3, art. 69(5); to attach a qualifier to aid in the definition (as it did with the term "gender"), *id.*, art. 7(3); to relegate defining the term to the treaty States Parties' amendment process or to a Review Conference (as it did with the crime of aggression), *id.*, arts. 5(2), 121, 123; or to attach a qualifier to direct the Court as to which body of law to look for a definition (for example, as it did with "applicable law"), *id.*, art. 21.

The drafters could have appropriately included the search and seizure privacy right in the rights of the accused section, which is where it rested for years. (*E.g.*, *id.*, art. 67). It could have been appropriately placed in the section outlining the rights of persons during an investigation, as searches and seizures are investigative tools used by law enforcement to ferret out crime and to obtain incriminatory evidence. (*E.g.*, *id.*, art. 55). Search and seizure provisions could have been enumerated to cover the suspects, non-suspects, the accused and innocent third parties who are implicated through an objectionable search or seizure. The provision could have been expressly incorporated directly into the judicial assistance and cooperation section, which already touches on search and seizure. Rome Statute, *supra* note 3, Part IX. Indeed, as human rights provisions are scattered throughout the Rome Statute, the

These arguments are not persuasive.²⁰⁸ First, the absence of an express reference has been insufficient to prevent other international tribunals from enforcing the right to privacy in the search and seizure context. For example, both the International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) have interpreted and applied the right in their cases, even though the right is not expressly mentioned in their respective statutes.²⁰⁹ Second, the statutes and rules of the two ad hoc tribunals cover a laundry list of rights, in the same manner as the Rome Statute (though the rights may not be co-extensive), and the Court may follow the lead of the other tribunals in expansively reading the human rights provisions.²¹⁰ The *inclusio unius est exclusio alterius* argument does not control. Third, though the privacy rights clause was deleted during the Rome Statute final negotiations, some delegations articulated support for the deletion on the grounds that privacy rights were covered elsewhere in the Rome Statute, including in Rome Statute, Part IX.²¹¹ Although this Article demonstrates that Part IX does not expressly provide for the search and seizure privacy right,²¹² and though it is possible that the ICC will reject the right under an *inclusio unius est exclusio alterius* argument, the right can still be found, implicitly, in the Rome Statute itself and in other collateral instruments.

Perhaps the most compelling argument favoring the existence of a search and seizure privacy right under the Rome Statute is that the right is an "internationally recognized human right," which must be enforced by the Court because Rome Statute, article 21(3) mandates the Court to apply all law "consistent with internationally recognized human rights." Thus, all "internationally recognized human rights" relevant to the Court's functioning must be enforced.²¹³ Since the search and seizure right to privacy is relevant to the right to a fair trial, such privacy rights must be enforced.

a. *"Applicable Law" and "Consistent with Internationally Recognized Human Rights"*

Article 21(3) of the Rome Statute calls for the Court, as it applies and interprets all applicable law, to ensure that that law is "consistent with

right to search and seizure privacy could have been expressly included virtually anywhere in the Rome Statute or its collateral instruments.

208. See Gallant, *supra* note 7, at 706-10 (comprehensively addressing these and other arguments).

209. See, e.g., Prosecutor v. Mucic, Case No. IT-96-21, Decision on the Tendering of Prosecution Exhibits 104-108 (Trial Chamber, Nov. 16, 1998; Feb. 9, 1998), ¶ 15 (Nov. 16, 1998).

210. See, e.g., Prosecutor v. Tadic, Case No. IT-94-1-AR72, 7 CRIM. L.F. no. 1 (1996); Prosecutor v. Mucic, Case No. IT-96-21, Decision on the Tendering of Prosecution Exhibits 104-108 (Trial Chamber, Nov. 16, 1998; Feb. 9, 1998).

211. See discussion *infra* Subsections IV.B.1 (discussing deletion of express search and seizure privacy right provision from the Rome Statute).

212. See generally *supra* Section IV.C (discussing Rome Statute, Part IX).

213. See Gallant, *supra* note 7, at 707.

internationally recognized human rights.” The Rome Statute drafters need not have expressly required consistency of applicable law with human rights. Consistency with human rights would have been presumed given the human rights obligations attached to the Rome Statute’s status as a U.N.-sanctioned international treaty (replete with express general and specific human rights provisions) and the ICC’s status as an inter-governmental organization (with human rights obligations operating by virtue of that status). However, given the existence of the consistency requirement, it is necessary to explore what constitutes “internationally recognized human rights.” Given that all aspects of the Court and its functioning must be consistent with internationally recognized human rights, all sources of applicable ICC law must likewise be consistent. As the search and seizure right to privacy is an internationally recognized human right, each source of applicable law must either implicitly or expressly provide for the right, or not implicitly or expressly deny the right. As the right exists in the ICC framework, all ICC law must safeguard it.

b. *What Are “Internationally Recognized Human Rights”?*

The Rome Statute does not define “internationally recognized human rights” for purposes of determining whether the applicable law is consistent, or at all, and does not define “consistent.”²¹⁴ However, one can still garner the meaning from (i) the plain meaning of the term; (ii) other Rome Statute terms, such as those appearing in the definition of “persecution” in the crimes against humanity context; and (iii) denotation.

(i) *Plain Meaning—“Internationally Recognized Human Rights”*

It is significant that the drafters chose “internationally recognized human rights” with which ICC law must be consistent, rather than any other of the seemingly limitless options, when it added the express consistency requirement late in the negotiating stages.²¹⁵

For example, it would not have been illogical for the drafters to have selected one of numerous phrases used in other international instruments²¹⁶ or in the jurisprudence of other international tribunals,²¹⁷ or used elsewhere

214. In the context of human rights treaties, one would think that the consistency requirement would call for a generous interpretation of “internationally recognized human rights.”

215. The consistency requirement was motivated in part to limit human rights coverage to those that are “recognized,” in an attempt to exclude safeguarding of certain rights, such as sexuality, gender, and procreation rights. See discussion *supra* note 88 (backfiring of crimes against humanity limiting language).

216. For example, the drafters might have required consistency with human rights (or international human rights) contained in either “the major” or specifically enumerated international or regional human rights instruments (for example, the UDHR, the ICCPR, or the European Convention on Human Rights), or in a list of international instruments similar to that annexed to the 1994 ILC Draft Statute and that had been proposed to be incorporated into the Rome Statute.

217. For example, the ICTY has used the term “internationally recognized standards of fundamental human rights.” *Prosecutor v. Tadic*, Case No. IT-94-I-T, 7 CRIM. L.F. 139 (1996), ¶ 25 (citing 1 MORRIS & SCHARF, *supra* note 60, at 175) (referring to “international human rights standards”

within the U.N. System.²¹⁸ Indeed, they might have chosen phrases used to express comparable concepts conveyed elsewhere within the Rome Statute itself.²¹⁹ The drafters might have required that ICC "applicable law" be consistent with international human rights;²²⁰ international human rights law;²²¹ internationally protected human rights;²²² or, internationally recognized and protected human rights.²²³ Though the phrase as chosen was

providing a "general standard for fair trial and due process" and "international standards of fair trial and due process" to, *inter alia*, set a standard for an international criminal court). The tribunal stated that ICTY Statute, Article 21 "provides minimum judicial guarantees to which all defendants are entitled and reflects the internationally recognized standard of due process set forth in Article 14 of the [ICCPR]. In fact, the Statute provides greater rights than the ICCPR by extending judicial guarantees to the pre-trial stage of the investigation." *Prosecutor v. Tadic*, Case No. IT-94-1-T, 7 CRIM. L.F. 139, (1996), at para. 25.

218. The term chosen could have been "internationally recognized (and/or protected) human rights norms (and/or standards)," and would have been consistent with the words of Secretary-General Boutros Boutros-Ghali, who stated the following, regarding the ICTY, in his Report to the U.N. Security Council appending what would become the ICTY Statute:

It is axiomatic that the [ICTY] must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings. In the view of the Secretary-General, such internationally recognized standards are, in particular, contained in article 14 of the International Covenant on Civil and Political Rights.

Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), para. 106, U.N. Doc. S/25704, May 3, 1993, and Corrigendum S/25704/Corr.1, July 30, 1993, *reprinted in* 2 MORRIS & SCHARF, *supra* note 60, at 3, 23 (footnote omitted).

219. The drafters might have called for consistency with: "fundamental rights" in accordance with (or not contrary to) international law as used in the definition of "persecution" under Rome Statute, article 7(2)(g). See Rome Statute, *supra* note 3, art. 7(2)(g): "'Persecution' means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity." The drafters used the term "universally recognized as impermissible under international law" when referring to persecution against any identifiable group or collectivity as an element of a crime against humanity. *Id.*, art. 7(1)(h); *see also* Draft Elements of Crimes, *supra* note 5, art. 7(1)(h) (discussing persecution under crimes against humanity). *See generally* Subsection VI.C.1.b.ii, *infra* (discussing persecution under crimes against humanity).

220. Human Rights Watch, in referring to the Rome Statute, article 21(1)(c) "general principles of law" source of applicable law uses the term "international human rights" to refer to the "international law and recognized norms and standards" with which the "general principles of law derived by the Court from national law of legal systems of the world" must be consistent. Furthermore, Human Rights Watch acknowledges that the Rome Statute article 21(3) "law" requires consistency with "internationally recognized human rights," rather than with "international human rights," the consistency with which is required for article 21(1)(c) "general principles." This suggests a perceived distinction between "international human rights" and "internationally recognized human rights," with each term containing a different set of rights. Human Rights Watch, *Summary of the Key Provisions of the ICC Statute* (Sept. 1998), at <http://www.hrw.org/campaigns/icc/docs/icc-statute.htm> (last visited May 21, 2001).

221. "International human rights law" is the term used by Human Rights Watch in its comment on the Consolidated Final Draft Statute. Human Rights Watch, *Justice in the Balance*, *supra* note 73. Human Rights Watch noted the need for the Court to "observe the highest standards of international human rights law," and it commented on the duty of the Court to operate without adverse distinction on grounds "as commonly defined by international human rights law." *Id.* (citing ICCPR, *supra* note 25, art. 26, and calling for retention of the consistency clause as the clause, which was added during the March/April 1998 Preparatory Committee Meeting, "enhances the current draft statute").

222. "Internationally protected human rights" is the term used in ICTY jurisprudence. *See* *Prosecutor v. Mucic*, Case No. IT-96-21, Decision on the Tendering of Prosecution Exhibits 104-108 (Trial Chamber, Nov. 16, 1998; Feb. 9, 1998). This phrase is also used in the title but not the text of ICTR Rule 95. Professor Gallant uses the two terms interchangeably. *See, e.g.*, Gallant, *supra* note 7, at 708.

223. This conjunctive version would resolve any disputes regarding the relationship between the definitions of "protected" versus "recognized."

carefully crafted,²²⁴ in the first instance, we look at its ordinary meaning when seeking to interpret it,²²⁵ even when faced with knowledge that the drafters may have intended a special meaning, that may or may not be accurately reflected by other language they might have chosen.²²⁶

The drafters selected “internationally recognized human rights.” The questions one must ask, pursuant to the Vienna Convention on the Law of Treaties, include: Objectively, what does the term “internationally recognized human rights” mean (or, does the term admit of more than one interpretation)? Subjectively, what did the drafters intend for the term “internationally recognized human rights” to mean (if the term is ambiguous or unclear on its face)? Teleologically, how will the Court interpret the term “internationally recognized human rights” in light of the object and purpose of the Rome Statute (with an object and purpose being to bring perpetrators to justice)? Will the Court determine that the right to privacy is an “internationally recognized human right”²²⁷ and fully enforce that right?

In accordance with article 31 of the Vienna Convention, one looks objectively to the ordinary, plain meaning of “internationally recognized human rights.” The obvious first point of analysis begs the question—can a reasonable, principled distinction be drawn between “internationally

224. See *Committee of the Whole, Summary Record of the 12th Meeting, 23 June 1998*, ¶ 52, U.N. Doc A/Conf.183/C.1/SR.12 (1998) (declaring that article 21(3) “was a consensus text [and] required that the law applied should be consistent with certain internationally recognized values”).

225. Vienna Convention, *supra* note 16, art. 31. Professors Steiner and Alston offer words of caution about the international tribunals (such as the Court) that will be faced with interpreting the ordinary or plain meaning of treaties such as the Rome Statute. They state:

Reliance upon literal construction or “strict” interpretation may however be an attractive method or technique to an international tribunal that is sensitive to its weak political foundation. It may be tempted to take refuge in the position that its decision is the ineluctable outcome of the drafter’s intention expressed in clear text, and not a choice arrived at on the basis of the tribunal’s understanding of policy considerations or relevant principles that may resolve a dispute over interpretation. Reliance on legislative history or *travaux préparatoires* can achieve the same result of placing responsibility on the drafters. The charge of “judicial legislation” evokes strong reactions in the United States; it inevitably influences judges of international tribunals and heightens the temptation to take refuge in the dictionary.

HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 109-10 (2d ed. 2000).

226. The drafters might have required consistency with human rights (or international human rights) as provided under customary international law or human rights (or international human rights) as provided under general principles of law, with a reference to Article 38 of the Statute of the International Court of Justice.

Consistency could have been required with human rights (or international human rights) norms (and/or standards); with “human rights,” or, simply with “rights” (as contained in the Rome Statute, article 54 requirement that the Prosecution must “[f]ully respect the rights of persons arising under [the Rome] Statute”). Rome Statute, *supra* note 3, art. 54(1)(c).

Consistency could also have been required with “fundamental human rights, or minimum internationally acceptable standards” (as suggested during the 1996 Prep Comm regarding exclusionary rule standards), see *1 Report of the Preparatory Committee, supra*, note 68, para. 289, or with “basic rights.” The drafters might have called for consistency with universal human rights; or universally protected human rights; or a category that is “universally recognized.” See Rome Statute, *supra* note 3, art. 7(1)(h) (referring to persecution); see also discussion *infra* at Subsection VI.C.1.b.ii.

227. Irrespective of whether the Rome Statute drafters’ word choice was random, the result of careful and deliberate negotiated compromise, an attempt to obfuscate the meaning, or the product of word games, the treaty term interpretation rules of the Vienna Convention may apply.

recognized human rights” and “international human rights” absent the descriptive “recognized?”²²⁸ The qualifier could easily have been omitted, or substituted with another term. This leads to dual categorization in the first instance: (1) international human rights (unqualified); and (2) internationally recognized human rights (qualified by “recognized”). The issue is the significance of the descriptive “recognized.” Logically, a descriptive term such as “recognized” would designate “internationally recognized human rights” as a subset of “international human rights,” with the qualifier serving to narrow the field. This would suggest that not all international human rights are “recognized,” or perhaps that not all human rights are “internationally recognized,” and that in the case of the Rome Statute, consistency would be required only with those rights falling within the subset of internationally “recognized” human rights. Thus, the term “recognized” would limit the field of international human rights relevant to the article 21(3) consistency finding.²²⁹ In any event, the term “internationally recognized human rights” arguably can admit of more than one interpretation.

However, article 31 of the Vienna Convention further instructs us to look at the ordinary meaning in the context of the treaty term—“internationally recognized human rights.” In assessing the context, we should consider the Rome Statute itself, and its collateral instruments (including the Final Act, the Draft Rules of Procedure, and the Draft Elements of Crimes). Unfortunately, neither the Rome Statute nor the collateral instruments defines “internationally recognized human rights,” nor speaks directly to the meaning to be given to “internationally recognized human rights.”

(ii) *Guidance from Crimes Against Humanity—Persecution*

The Rome Statute definition of “persecution” as a “crime against humanity” illuminates how “internationally recognized human rights” under article 21(3) should be or should not be properly defined. Article 7(1)(h) renders as a crime against humanity “[p]ersecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law.”²³⁰ The corresponding

228. As I discern no non-grammatical reason for distinguishing the adverb “internationally” from the adjective “international,” this Article will not explore that distinction further, except to say that both terms would seem to speak to an identical relationship between a particular right and the global community.

229. The quantity of “recognized” rights would necessarily be smaller than the quantity of “international human rights,” as otherwise there would be no reason to add the qualifier “recognized.” Similar arguments can be made regarding the adverbial qualifier “internationally,” in which case we would attempt to ascertain a principled distinction between “internationally recognized human rights” and “recognized human rights” and/or “human rights” without the international qualifier.

230. The chapeau to Article 7 requires that to be actionable, the persecution must be “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” Rome Statute, *supra* note 3, art. 7(1); *see also* Draft Elements of Crimes, *supra* note 5, art. 7(1)(h) (discussing persecution under crimes against humanity).

provision of the Draft Elements of Crimes provides, as an element: "The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights."²³¹

Article 7(1)(h) and Draft Elements, article 7(1)(h)(3), in reciting a list of anti-discrimination groups or collectivities, might easily have described the groups or collectivities as "internationally recognized" (as in article 21(3)) rather than as "universally recognized."²³² This suggests that "universally recognized" differs from "internationally recognized," and that in fact "universally recognized" reflects a more select group than "internationally recognized," and that proof of "universally recognized" would have a higher threshold than proof for "internationally recognized."²³³ Though these words may not shed light on the precise meaning of "internationally recognized" or "universally recognized," it is appreciated that "internationally recognized" is perhaps not to be defined as "universally recognized," and that "universally recognized" is the narrower of the two categories.²³⁴ Furthermore, as regards Draft Elements, article 7(1)(h), various delegations supported a U.S. proposal

231. The corresponding Draft Elements of Crimes, *supra* note 5, article 7(1) (h) ("Crime against humanity of persecution") provides, in relevant part:

1. The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.

2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.

3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law.

232. The drafters of the Rome Statute resisted an open-ended list of grounds for the definition of persecution, on the basis that such a list would "be too imprecise and would violate the principle of legality, since the statute would be an instrument of criminal law and not a declaratory human rights instrument." Robinson, *supra* note 6, at 54. Robinson continues:

A compromise was eventually reached by including an open-ended, but very high-threshold provision, which refers to "other grounds that are universally recognized as impermissible under international law." Thus, if any other prohibited grounds of discrimination become clearly established in international law, they can automatically be incorporated without amending the statute. Universal recognition, however, is a very high threshold; consequently, amendment of the statute to reflect future developments remains a possibility.

Id. at 54. An April 2000 circulated draft of the Draft Elements of Crimes provided, as regards article 7(1)(e), a proposed rule: "The gravity of the conduct was such that it was in violation of fundamental rules of international law and the accused was aware of such conduct." *Elements of Crimes (Draft)*, Annex III, Addendum, U.N. Doc. PCNICC/2000/L.1/Rev.1/Add. 2 (2000). A footnote added to that paragraph provided: "Some delegations want to add the concept of universal recognition to qualify 'fundamental rules of international law.'" *Id.*

During Rome Statute negotiations, the term "customary international law" had been proposed in lieu of the adopted "universally recognized" in the persecution provision (and in the provision related to imprisonment or other severe deprivation of physical liberty under Rome Statute, *supra* note 3, article 7(1)(e)), as a way of distinguishing crimes against humanity from "ordinary" human rights violations.

233. Robinson, *supra* note 6, at 54 (discussing the "high threshold" for "universal").

234. Human Rights Watch notes that "Another controversial inclusion is persecution on 'other grounds' beyond those specified in the statute, but the confusing limitation to those 'universally recognized' grounds is regrettable." Human Rights Watch, *supra* note 220. However, rather than creating confusion, this is yet another instance in which the drafters unsuccessfully attempted to limit human rights coverage by including the broad "other grounds" language, which would include, for example, the right to be free from discrimination based on sexual orientation, which is an "internationally recognized" ground.

(which was rejected) to modify “fundamental human rights” with the term “universally,” which would have raised the threshold and decreased the category of rights that would fall within its ambit,²³⁵ and again which would illustrate the force of the qualifier “universal.”

(iii) *Denotation*—“*Internationally Recognized Human Rights*”

Denotation is important in understanding the ordinary meaning of a treaty term.²³⁶ “Universally” pertains to the world and a universal human right is relevant in all world societies.²³⁷ “Internationally” suggests a subset of the world, and refers to the right vis-à-vis a combination of some but perhaps not all states.²³⁸ All “universally recognized human rights” would necessarily be “internationally recognized,” whereas the converse may not be true—some “internationally recognized human rights” may not be “universally recognized.”²³⁹ Thus, “universally recognized human rights” would be a smaller category of rights than “internationally recognized human rights,” with the former being a subset of the latter.²⁴⁰

Though the origin of the phrase “internationally recognized human rights” is unclear from the *travaux préparatoires*, an early iteration of the Rome Statute proposed that all laws applied by the ICC be consistent with “internationally protected human rights”²⁴¹ as used in the ICTY Statute.²⁴² Is

235. See, e.g., Human Rights Watch, *Human Rights Watch Commentary—Third Preparatory Commission Meeting on the International Criminal Court: Elements of Crimes and Rules of Evidence and Procedure* (Nov. 1999), available at <http://www.hrw.org/campaigns/icc/prepcom-nov99.htm> (last visited May 21, 2001) (noting that the U.S. proposal regarding “Article 7(1)(h)(3) raises the threshold from ‘deprivation of fundamental rights contrary to international law,’ in Article 7(2)(g) to deprivation of ‘fundamental rights universally recognized under international law.’ Universal recognition, which appears in the [Rome] Statute in relation to the grounds for persecution, is an extremely high threshold.”) (emphasis in original).

236. See, e.g., ASSOCIATION INTERNATIONALE DE DROIT PÉNAL, *supra* note 72 (referring to dictionary meaning to understand ICC Draft Statute treaty terms).

237. BLACK’S LAW DICTIONARY 1535 (6th ed. 1990) defines “universal” as: “Having relation to the whole or an entirety; pertaining to all without exception; a term more extensive than ‘general,’ which latter may admit of exceptions.”

238. See, e.g., *id.*, at 816.

239. “Internationally recognized human rights” might include rights that are “recognized” regionally or by another subset of nations, but not recognized by the entire body of nations.

240. Furthermore, considering the nature of the Rome Statute and the collateral instruments, it is reasonable to conclude that an interpretation of “internationally recognized human rights” would be broad, rather than narrow, irrespective of whose rights are in question. Or, some would argue that such an interpretation should be narrow, a position that might be supported by the Rome Conference’s deletion of the express reference to the right to privacy in the Rome Statute. An explanation for this, going outside the intrinsic instruments, is that the drafters sought to limit the legal significance of the term “gender.” So, in an attempt to limit the category of rights, they insisted on “universally recognized” versus rights that may be only “internationally recognized.”

241. For example, the Zutphen Draft Statute mentioned the term “internationally protected human rights” among other terms in a compilation of proposals related to the admissibility or the exclusion of evidence. Zutphen Draft Statute, *supra* note 68, art. 62[44][69](5). The compilation of proposed terms was accompanied by a footnote that provided, in part:

It was felt that it would be better to refer to “rules of international law” than to single out the International Covenant on Civil and Political Rights, although this will of course be

there a distinction between “internationally recognized human rights” and “internationally protected human rights?” If the two terms designate different categories of human rights, what rights fall into each category? Scholars and jurists oft consider the two phrases and other similar phrases fungible and use them interchangeably, even within the context a particular writing.²⁴³ However, if they were to be deemed different, would one be a subset of the other?

Arguably, “internationally protected human rights” is a subset of “internationally recognized human rights.” All rights that are “recognized” internationally may not be appropriately or adequately “protected,”²⁴⁴ with “protected rights” being those that are “enforced,” and “recognized rights” being either merely “enforceable” or possibly “unenforced.” If this distinction holds, along with the distinction represented by adding “recognized” to the phrase “international human rights,” one can see a clear relationship.²⁴⁵

“International human rights” would represent an exhaustive set of human rights, including all rights that are recognized and/or protected.²⁴⁶ “Internationally recognized human rights” would be a subset of “international human rights” and would consist of all human rights “recognized” by either the international community as a whole, or by a subset of the international community (perhaps in the form of the ICC States Parties or signatories).²⁴⁷ In

the main focus of this rule. The formula “internationally protected human rights” is intended to cover non-treaty standards as well and would therefore be broader than “international law.”

Id., at n.214.

242. See ICTY, rule 95, *supra* note 34.

243. For example, Professor Gallant, in discussing the omission of the express right to privacy from the Rome Statute and arguments that proponents and opponents would make regarding the implicit coverage of the right to privacy within the ICC regime, fungibly uses the terms “internationally recognized human right” and “internationally protected human right,” even within the same paragraph. See, e.g., Gallant, *supra* note 7, at 708. Not only are those two terms used interchangeably, but also similar terms are varied. Another commentator, advocating for a “well-defined human right” to a healthy environment, refers interchangeably to a right to a healthy environment and to other rights he argues are in the same category in terms of a “recognized international human right,” a “universal right,” a “human right,” and an “established international human right”—that are “universal and fundamental in nature, as human rights are understood to be.” John Lee, *The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law*, 25 COLUM. J. ENVTL. L. 283, 284 (2000). The author also refers to the right to a healthy environment as a “recognized principle of international human rights law” and as an “internationally-recognized human right.” *Id.* at 284, 287. Though the *travaux préparatoires* may be construed to suggest that no legally cognizable distinction exists between the terms, it is necessary to examine the terms pursuant to treaty interpretation rules.

244. But, the lack of a right’s enforcement equals the unrealization and not the non-existence of that right.

245. Of course there could be different gradations of “recognition.”

246. In fact, “international human rights” could conceivably include rights that are neither recognized nor protected, or that might not even be extant. A right may be non-positive, and hence need not be declared or written on paper in order for the right to exist.

247. Professor Gallant argues that “The great internationally recognized rights in the ICCPR, freedom of expression, religion, conscience, assembly and association are at the core of what is to be protected by the phrase ‘internationally recognized human rights.’” See Gallant, *supra* note 7, at 703 (pointing out that “protection from discrimination on the basis of ‘religion or belief, political or other opinion’ is expressly included” in the equal protection clause, “and can be read as an exemplification of the types of substantive rights to be protected.” *Id.*). Professor Gallant may be correct. However, simply

turn, "internationally protected human rights" would be a subset of "internationally recognized human rights." This would envision that some rights might be "recognized," but for various reasons (for example, lawful or unlawful derogations) might not be "protected" (for example, are constantly violated, or perhaps have no positive laws prohibiting violations of the right).

A schematic could take the form of three circles, one inside the other, with the largest outermost circle representing "international human rights," the middle circle representing "internationally recognized human rights," and the innermost circle representing "internationally protected human rights."

If that is so, into which category would the search and seizure right to privacy fall? If the right falls into the "internationally recognized human rights category" or into its subset "internationally protected human rights," then the right would be deemed covered by the Rome Statute. If the right falls within the "international human rights" circle, but not within one or both of the two inner circles, the right may not be covered by the Rome Statute. If the "right" falls outside all three circles, then it perhaps would not be a right at all, and would perhaps not be covered by the treaty.

Another possibility is that "protected" equals "recognized," as those terms are used interchangeably in human rights vernacular, and would apply equally, irrespective of whether the rights were "enforced" or merely "enforceable" (or "unenforced"). One would still be faced with a duality, with those two terms being on one side, and with "international human rights" on the other, and an analysis would revert to distinguishing between "international human rights" versus "internationally recognized/protected human rights." If no such reasonable distinction can be drawn, and if indeed the full range of human rights in the international arena (including "internationally recognized human rights," and "internationally protected human rights") is captured by the phrase "international human rights," then all human rights, irrespective of moniker, would be covered by the Rome Statute.

What about the Rome Statute's use of the term "universal?" If we consider that the drafters could have chosen the term "universal" or "universally" to describe either recognized or protected human rights (as it chose "universally" regarding persecution and crimes against humanity in article 7(h), instead of using the term "internationally"), the meaning of article 21(3) might be different. "Universal" human rights would represent a set of rights less substantial than "international" human rights, and "universal" would fall on the schematic as a circle within the international human rights circle, and would necessarily either be greater than or less than the circle(s) representing "internationally recognized human rights" or "internationally protected human rights."²⁴⁸

because expression, religion, conscience, assembly and association are "internationally recognized" in the ICCPR does not mean that they are necessarily "recognized" in the Rome Statute. One might argue that there would be no need for the phrase "internationally recognized human rights," as human rights would be all encompassing, and would include all expressly enumerated rights as well as any that are not mentioned.

248. "Universal" would not likely be held to be co-extensive with "internationally recognized" or "internationally protected," unless all three of the terms were deemed co-extensive with "international

It might be instructive to toss into the mix other points of comparison that may shed some light on the meaning of "internationally recognized human rights." For example, are "internationally recognized human rights" more or less inclusive than rights that are deemed to have risen to the level of customary international law, or than rights that are considered general principles of law (as per article 38 of the ICJ Statute)? If the drafters had intended "internationally recognized human rights" to equal "customary international law," "customary rights," or "general principles of law derived from national laws," presumably, the drafters would have used that language in the Rome Statute. But they did not.²⁴⁹ Where would customary international human rights law and general principles of human rights law fit in the schematic?

Perhaps it would be most appropriate to follow the lead of the United Nations in the Vienna Declaration and Programme of Action, which provides that "human rights are universal."²⁵⁰ If the search and seizure privacy right exists, it is inherently universal. It is necessarily global, international, regional, recognized, protected, guaranteed, and enforceable. Thus, the appropriate question is not whether the search and seizure privacy right is covered by the Rome Statute. The appropriate question is whether the search and seizure right to privacy is indeed a right, as "rights" fall within the language of the Rome Statute and are to be enforced via the article 21(3) consistency clause. To determine whether the search and seizure privacy right is indeed a right, one must explore the Court's "applicable law," which is where the Court will look for its rights determinations, and ask whether the right is found in subsequently listed applicable law sources under Rome Statute, article 21.²⁵¹

human rights," in which case all circles would collapse (or expand) into one.

249. Professor Bassiouni argues that the right to privacy is a general principle of law and an "internationally recognized human right." See M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235 (1993).

250. *World Conference on Human Rights: Vienna Declaration and Programme of Action*, art I.5, U.N. GAOR, U.N. Doc. A/Conf.157/23 (1993) [hereinafter Vienna Declaration]. The Vienna Declaration persuasively declares that "All human rights are universal, indivisible, inter-dependent, and inter-related." *Id.* This is so, despite claims that the Vienna Declaration carves out a cultural relativism exception to universalism, for example, in its following language: "While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms." *Id.* art. 5. Though a discussion of the human rights universalism versus relativism debate is beyond the scope of this Article, it is important to note that consensus does not exist on the scope, content, and reach of human rights around the globe. See, e.g., Makau wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT'L L. 589, 656 (1996) (contending that "[e]very culture will have its distinctive ways of formulating and supporting human rights," and that "[e]very society can learn from other societies more effective ways to implement human rights"); see also Hope Lewis, *Between Irua and "Female Genital Mutilation": Feminist Human Rights Discourse and the Cultural Divide*, 8 HARV. HUM. RTS. J. 1, 17-20 (1995) (discussing the universalism versus cultural relativism debate in the human rights field).

251. A similar framework for argument may be used regarding other rights, including environmental "rights" (for example, when the Court is faced with environmental degradation as an instrument or tool of genocide, a war crime, or a crime against humanity), or sexuality rights (where sexual minorities are persecuted, and the issue raised is whether the elements of crimes against humanity

2. *Source of Applicable Law # 2: Elements of Crimes—Rome Statute, Article 21(1)(a)*

The Elements of Crimes are a Rome Statute source of law because Rome Statute, article 21(1)(a) provides that the Court “shall apply” the Elements of Crimes. Furthermore, Rome Statute, article 9 provides that the Elements of Crimes “shall assist the Court in the interpretation and application of articles 6, 7 and 8,” which are the three articles that outline the three principal crimes for which the Court has jurisdiction: (1) genocide; (2) crimes against humanity; and (3) war crimes.²⁵² The Elements of Crimes,²⁵³ as a source of law and as a means of clarifying the scope of the Rome Statute crimes, “shall be consistent with [the Rome] Statute.”²⁵⁴ Thus, as part of the body of law that the Court must interpret and apply, and as a means to assist the Court, the Elements of Crimes and their application and interpretation must be consistent with the entire Rome Statute, which includes article 21(3), requiring consistency with internationally recognized human rights.²⁵⁵ However, the Elements of Crimes are apposite to a search and seizure right to privacy for other reasons.

Though the Draft Elements of Crimes may appear to be silent on the question of the right to privacy in the context of searches and seizures, the Draft Elements of Crimes contain language that will aid the Court in interpreting the terms of the Rome Statute, even as regards privacy rights. In particular, the Court, for aid in determining whether the right to privacy is an “internationally recognized human right,” may interpret the Elements of Crimes associated with Rome Statute, article 7(1)(h) (“or other grounds that are universally recognized as impermissible under international law”), associated with article 7(2)(g) (“fundamental rights contrary to international

are met), considering the definition in Rome Statute, article 7(h). *See* Rome Statute, *supra* note 3, art. 7(h).

252. Rome Statute, *supra* note 3, art. 5(1)(a)-(c). Rome Statute, *supra* note 3, article 5(1)(d) and article 5(2) provide that the Court has jurisdiction over the crime of aggression, but the Court “shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime.”

253. The Draft Elements of Crimes was finalized on July 6, 2000. *See* Draft Elements of Crimes, *supra* note 5.

254. Rome Statute, *supra* note 3, art. 9(3).

255. *See id.*, art. 21(3). Tensions exist between the Elements of Crimes as a source of law and the Elements of Crimes existing to assist the Court in interpreting Rome Statute, articles 6, 7, and 8. If the Elements of Crimes are a source of law, then they would be expected to bind the Court, pursuant to Article 21, which outlines the Rome Statute’s “applicable law.” However, if the Elements of Crimes are merely to “assist” the Court in interpreting and applying articles 6, 7, and 8, then arguably the Elements of Crimes are merely persuasive authority for the Court, and not binding. This inconsistency, which may exist because of the piecemeal manner in which the Rome Statute was spliced together, does not undermine the contention that the Court must enforce the search and seizure right to privacy. Article 9(3) requires that the Elements of Crimes be consistent with the Rome Statute, and the Rome Statute requires consistency with internationally recognized human rights. Because the search and seizure right to privacy is an internationally recognized human right, article 9 (and hence the Elements of Crimes) must not be inconsistent with the search and seizure right to privacy.

law”), and associated with other similar language in various provisions of the Rome Statute.²⁵⁶

3. *Source of Applicable Law # 3: Rules of Procedure and Evidence—
Rome Statute, Article 21(1)(a)*

Though the Rules of Procedure and Evidence (Rules of Procedure) are well-suited for incorporating search and seizure privacy right provisions given the absence of such express provisions in the Rome Statute, the Draft Rules of Procedure finalized on June 30, 2000 are silent on such rights, except as concerns the communication privilege.²⁵⁷

Since the Rules of Procedure are intended to support and underpin the Rome Statute,²⁵⁸ they are to be consistent with the treaty. Thus, as part of the body of law to be interpreted and applied, the Rules of Procedure, and any amendments thereto or any provisional rules, and their application and interpretation, must be consistent with the entire Rome Statute, which includes article 21(3), requiring consistency with internationally recognized human rights.²⁵⁹ However, this is not all that renders the Rules apposite to the search and seizure right to privacy.

The Rules are relevant because they are still in Draft form, and can be amended to include an express reference to the search and seizure right to privacy. Even if such amendments are not made to the Draft Rules during the remaining Preparatory Commission sessions, once the Preparatory Commission disbands and the Court comes into being, the Assembly of States Parties can amend the Draft Rules before adopting them, or adopt different rules. Just as the communication privilege was expressly provided for in the Draft Rules of Procedure, the general search and seizure right to privacy can likewise be expressly safeguarded.²⁶⁰ Even if the search and seizure privacy

256. See generally, discussion, *supra* Subsection VI.C.1.

257. See *supra*, note 20 (discussing Draft Rules of Procedure provision on privilege).

258. The Working Group on Rules of Procedure and Evidence of the Preparatory Commission identified objectives of the Rules of Procedure:

The Rules of Procedure and Evidence are an instrument for the application of the [Rome] Statute, to which they are subordinate in all cases. In elaborating the Rules of Procedure and Evidence, care has been taken to avoid rephrasing and, to the extent possible, repeating the provisions of the [Rome] Statute. Direct references to the [Rome] Statute have been included in the Rules, where appropriate, in order to emphasize the relationship between the Rules and the [Rome] Statute, as provided for in article 51, in particular, paragraphs 4 and 5 [of the Rome Statute].

In all cases, the Rules of Procedure and Evidence should be read in conjunction with and subject to the provisions of the [Rome] Statute.

Draft Rules of Procedure, *supra* note 5.

259. See Rome Statute, *supra* note 3, art. 21(3).

260. The Court, before ruling on the exclusion of evidence, should assess whether the search and seizure privacy right is an internationally recognized human right. The Court may conduct an analysis not unlike that contained in this Article to determine the right's existence, and then ascertain the right's scope. The Court could be spared that analysis if the drafters amend the Draft Rules of Procedure to incorporate the right to privacy expressly. Though the Draft Rules of Procedure have been finalized, the Preparatory Commission may still amend them, *inter alia*, to incorporate expressly the right, and/or to include language to guide the Court on how to interpret and apply the right. Though the Court will likely find the implicit search and seizure privacy right, the integrity and legitimacy of the Court will be

right is not expressly reinstated legislatively, the Court in its jurisprudence can and should declare and re-affirm the existence of the search and seizure right to privacy.

4. *Source of Applicable Law # 4: "Applicable Treaties"—Rome Statute, Article 21(1)(b)*

The *travaux préparatoires* are unclear on which treaties are "applicable treaties,"²⁶¹ but the term might be interpreted as being those treaties with provisions that address issues that might also be addressed by the ICC. For example, a mutual legal assistance treaty or an extradition treaty might be in force that would directly address an issue relevant to the Court but that is not addressed in the Rome Statute, Rules of Procedure, or Elements of Crimes. If one concludes that treaties such as the ICCPR, that provide for the right to privacy, are not directly "applicable"²⁶² to the ICC and would not be appropriately applied, because, for example, the ICC is not a state party to that treaty,²⁶³ then article 21(1)(b) would arguably be of little guidance in answering the consistency question with respect to the right to privacy and searches and seizures.²⁶⁴ The ICCPR and other such treaties will likely be deemed "applicable treaties" because a substantial number of Rome Statute signatories and ratifiers have adhered to the ICCPR; the *travaux préparatoires* repeatedly refer to incorporation of ICCPR provisions into the Rome Statute; ICCPR rights are customary international law, which is an article 21 source of applicable law; and because the ICC's status as an inter-governmental organization created under U.N. auspices renders the ICCPR applicable to the ICC.

enhanced if such an important right is incorporated legislatively, (for example, through drafters' amendments), rather than judicially. The Assembly of States Parties amendment procedure is more cumbersome and perhaps less likely to succeed than the Preparatory Commission procedure, which requires a simple majority vote. The Assembly of States Parties, which consists of all States that have adhered to the Rome Statute, can approve "[d]ecisions on matters of substance" by a "two-thirds majority of those present and voting provided that an absolute majority of States Parties constitutes the quorum for voting" *Id.*, art. 112(7)(a). However, Assembly of States Parties "[d]ecisions on matters of procedure shall be taken by a simple majority of States Parties present and voting." *Id.*, art. 112(7)(b).

If the Assembly of States Parties does not amend, incorporation of the right will ultimately be left for the Court when it is first faced with an international human rights law challenge by an accused whose privacy rights have been threatened.

261. See, e.g., *Committee of the Whole, Summary Record of the 12th Meeting, 23 June 1998*, ¶ 79, A/Conf.183/C.1/SR.12 (1998) (Colombian delegate stating that "it was unclear what was meant by 'applicable treaties'" in article 20(1)(b)[21]).

262. Recently, the International Court of Justice was called upon to give meaning to the term "applicable" in the context of the United Nations Treaty on Diplomatic Immunities. See *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, 1999 I.C.J. (Apr. 29), available at <http://www.icj-cji.org/iccjwww/idecisions.htm> (last visited May 21, 2001).

263. See Gallant, *supra* note 7, at 707 (presuming application of the ICCPR to the Rome Statute and to the ICC).

264. The Rome Statute suffers from its use of the unfortunate adjective "appropriate" to describe the "applicable treaties" as a source of law in article 21(1)(b).

The Vienna Convention might also be an applicable treaty that addresses issues not covered by the Rome Statute, such as how to interpret the Rome Statute itself.²⁶⁵

5. *Source of Applicable Law # 5: "Where Appropriate . . . Principles and Rules of International Law (Including the Established Principles of the International Law of Armed Conflict)"*²⁶⁶—Rome Statute, Article 21(1)(b)

- a. *"Principles and Rules of International Law"*

The Court, when it reaches this source of applicable law, will ask whether any meaningful distinction can and should be drawn between a "principle" of international law on the one hand, and a "rule" of international law on the other. Some might suggest that the terminology is not redundant—that a meaningful distinction can be drawn in that "principles" imply a philosophical base, whereas "rules" are based in positive law and are not necessarily philosophically-rooted.²⁶⁷ That distinction is immaterial for present purposes. Irrespective of whether one concludes that "principle" and "rule" are distinct or identical, one is next faced with identifying precisely to which principle(s) and/or rule(s) of international law, Rome Statute, article 21(1)(b) refer.

During the Rome Conference, the Working Group on Article 20[21]²⁶⁸ debated the designation of the law to which the Court was instructed to apply under article 21(1)(b), and queried whether it would be "principles and rules of *general* international law" or "principles and rules of international law," without the modifier "general."²⁶⁹ The inquiry focused on which principles and rules would fall into the category, with an accurate descriptive being chosen to reflect the substantive content of that applicable source of law.

The Working Group on Article 20 sought to parse through appellation and substantive content concerns. Underlying the debate was whether the applicable law sought to be described was equal to, or greater or less than, customary international law,²⁷⁰ and indeed what constitutes "international

265. See generally discussion *supra* Subsection VI.C.4 (discussing "applicable treaties").

266. Again, we have the imprecise and ambiguous "where appropriate" language. "Appropriate" has been defined as: "suitable or fitting for a particular purpose." This offers little guidance. See *supra* note 264.

267. "Principle" and "rule" could easily be construed as redundant, such as other legal phrases, including "part and parcel" and "to have and to hold."

268. The working group was entitled "Working Group on Article 20," as "20" was the number assigned to an earlier iteration of the article that turned into Rome Statute, article 21. In this Article, that working group will be referred to as the "Working Group on Article 20[21]."

269. Notes of July 10, 1998 Taken During the Working Group on Article 20[21] Session (on file with the Author).

270. "The substantive content of this source of applicable law was intended to be broad, sweeping within its ambit customary international law." ASSOCIATION INTERNATIONALE DE DROIT PÉNAL, *supra* note 72, at 36. A natural extension of the debate over the scope of "the principles and rules of general international law" (pursuant to the Consolidated Final Draft Statute, *supra* note 68, art. 20) is the query whether that term encompasses "general principles of law derived by the Court from national legal systems of the world" (pursuant to Rome Statute, article 21(1)(c)). Human Rights Watch argued,

law.”²⁷¹ It was suggested that “general international law” meant “customary international law.”²⁷² Some countries, such as Poland, suggested that “customary international law” was broader than “general international law,” while other countries, such as Kenya, contended that “general international law” was broader and included both public and private international law. Some delegations, such as Guatemala and Iraq, pushed for precision in appellation and thus for including the term “customary international law,” if that was indeed what the drafters intended to reflect, while other delegations found “general international law” or “international law” acceptable. To resolve the dispute, a footnote was proposed to define “international law” or “general international law.” The agreed footnote was, “the term ‘international law’ means public international law,” thus resolving the debate as to whether the phrase “general international law” referred solely to customary international law, or whether private international law was included.²⁷³

The Rome Statute as adopted incorporates the broad term “principles and rules of international law,” without any footnotes and without the word “general” or any other modifier.²⁷⁴ This adopted phraseology implies more than its words alone suggest; it represents an expansive corpus of law.²⁷⁵

regarding the Consolidated Final Draft Statute, article 20:

“General principles of law recognized by civilized nations” is one of the sources of international law, as established in Article 38 of the Statute of the International Court of Justice. As such, the reference in [Consolidated Final Draft Statute,] article 20(1)(b) to “the principles and rules of general international law,” already comprises the principles and rules of law generally recognized in national legal systems. However, in the interest of clarity, specific reference could be made to these general principles of law as a source of applicable law.” (footnotes omitted).

Human Rights Watch, *supra* note 73, § G, art. 20(1).

271. BLACK’S LAW DICTIONARY 816 (6th ed. 1990) (citations omitted), defines “international law” as:

Those laws governing the legal relations between nations. Rules and principles of general application dealing with the conduct of nations and of international organizations and with their relations inter se, as well as with some of their relations with persons, whether natural or juridical. Body of consensual principles which have evolved from customs and practices civilized nations utilize in regulating their relationships and such customs have great moral force. . . . International customs and treaties are generally considered to be the two most important sources of international law.

272. The 1994 ILC Draft, *supra* note 68, art. 33, proposed “general international law” as a source of applicable law for the Court. Commentators contended that that general international law clause “includes the entire corpus of international criminal law, whether derived from the practice of national or international fora.” STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 180 (1997). This comment illustrates to some degree the drafters’ apparent overarching concern with the law to be applied to substantive rather than procedural criminal law issues. However, this comment also illustrates the contention that “general international law” is indeed broad, and would subsume customary international law, both in the substantive and procedural criminal law contexts.

273. *Committee of the Whole, Working Group on Applicable Law: Report of the Working Paper on Applicable Law*, art. 20(1)(b)[21] (1998), U.N. Doc. A/Conf.183/C.1/WGAL/L.2.

274. It was decided that no footnotes would be incorporated into the Statute. Information that would have been footnoted is incorporated directly into the text or was deleted. For example, the “gender” definition began as a footnote, but was ultimately incorporated as a qualifier in the text of the Rome Statute. *See, e.g.*, Rome Statute, *supra* note 3, art. 7(3).

275. There was additional controversy over the proposed deletion of the phrase “including the established principles of the law of armed conflict.” Some states favored deletion of the phrase, but would find it acceptable if “international” were added to “law of armed conflict.” *See* Rome Statute,

Under Rome Statute, article 21(1)(b), “international law” (or public international law) includes bodies of law beyond just customary international law.²⁷⁶ For example, under article 21(1)(b), “international law” also includes the areas of international human rights law²⁷⁷ and international humanitarian law.

The significance of this is that we have now identified another rule that can be relied upon to bolster the argument that all principles of international human rights law, including principles not expressly referred to in the Rome Statute or its collateral instruments, must be followed by the ICC in its operations. If higher-ranked sources fail, and the Court reaches the “principles and rules of international law” analysis under article 21(1)(b), the Court must analyze whether the questioned right falls within any of the subsumed bodies of international law referred to in article 21(1)(b).²⁷⁸ Thus, the Court must analyze whether the right to privacy has risen to the level of customary international law; whether the right to privacy is a principle or rule of international human rights law; or in case of armed conflict, whether it is covered by international humanitarian law.²⁷⁹ This analysis will occur in addition to the analysis of whether the right in question is an “internationally

supra note 3, art. 21(1)(b). For example, the Israeli delegation, referring to paragraph 1(b), suggested that “including the established principles of the law of armed conflict” was “unnecessary and could be deleted, since such principles obviously formed part of the principles of general international law.” *Committee of the Whole, Summary Record of the 12th Meeting, 23 June 1998*, ¶ 65, U.N. Doc. A/Conf.183/C.1/SR.12 (1998). The Greek delegation suggested that “including the established principles of the law of armed conflict” was “superfluous, since international law in any case included the law of armed conflict.” *Id.*, ¶ 72.

276. See Leila Nadya Sadat, *Custom, Codification and Some Thoughts About the Relationship Between the Two: Article 10 of the ICC Statute*, 49 DEPAUL L. REV. 909, 918 (2000) (“[T]he Statute itself contemplates that the Court will use customary international law outside the ICC Statute in its decisions. Article 21, on applicable law, permits the Court to apply ‘where appropriate, applicable treaties and the principles and rules of international law’” Furthermore, the “resort to international law outside the Statute is permitted only to supplement the terms of the Statute itself, not to supplant them; presumably then, the framers were contemplating the use of international law as a gap filler”).

277. The broad terminology may be superfluous because internationally recognized human rights are already included by operation of article 21(1), article 21(3), and other provisions. See Rome Statute, *supra* note 3, arts. 21(1), 21(3). One could argue that international human rights law as a subset of international law is broader than the Court’s mandate to apply law consistent with internationally recognized human rights.

This also supports the view that sexual orientation and other not expressly “omitted” rights are implicitly included, as the Court is directed to consider international human rights law in the application of all laws. Indeed, “principles and rules of international law” would subsume all the international law sources contained in article 21, including the treaty sources in 21(1)(a) (the Rome Statute, the Elements of Crimes and the Rules of Procedure) and 21(1)(b) (“applicable treaties”), and “general principles of law derived by the Court from national laws of legal systems of the world . . .” contained in 21(1)(c), as those sources are deemed “international law” for article 38 purposes. See Rome Statute, *supra* note 3, arts. 21(1)(a)-(c).

278. Keep in mind that the immediate issue relates to ascertaining the existence and scope of the search and seizure right to privacy. In other cases, the issue might be of a different nature, for example, in determining the parameters of an issue of substantive criminal law (for example, the elements of a particular crime).

279. An analysis of international humanitarian law aspects of issues relating to searches and seizures is beyond the scope of this Article. The international law of armed conflict was listed to settle any debate about the scope of this source of law, though it could easily have been excluded from express mention, and still recognized implicitly. It was included in a parenthetical for the avoidance of doubt.

recognized human right" under article 21(3), an analysis which must be done with respect to any law interpreted and applied by the Court, regardless of whether the law in question directly relates to international human rights law, or to criminal law or procedure. The international law analysis will overlap with the analysis of whether the right to privacy is an internationally recognized human right.

Since the right to privacy is found in international human rights law, which itself is a subset of public international law, or international law, which is a source of law under article 21(1)(b), the search and seizure privacy right can be found in article 21(1)(b)(ii), and the Court is obliged to enforce that right.

b. *Search and Seizure Privacy Rights as Customary International Law—Rome Statute, Article 21(1)(b)*

If the right search and seizure right to privacy has risen to the level of customary international law, the Court would be obligated to enforce the right pursuant to article 21(1)(b). Customary international law is subsumed under international law, which is an applicable source of law under Rome Statute, article 21(1)(b) that is to be applied by the Court when higher-ranking sources of law are inadequate to resolve the issue at hand. Thus, it is necessary to understand what constitutes customary international law in general, and in particular what constitutes customary international human rights law.²⁸⁰

Customary international law is based on states' implicit consent to be bound. Two elements must be present for a principle or rule of customary international law to exist:²⁸¹ (1) state practice as proof of custom; and (2) *opinio juris vel necessitatis (opinio juris)*.²⁸² Satisfaction of the state practice

280. See discussion *supra* Subsection VI.C.5.a.

281. Proof of customary international law of human rights involves analysis somewhat like that involved in determining principles of "general" customary international law. However, certain types of evidence of custom are commonly asserted to argue that particular rights have risen to the level of customary international law, that are generally not used to support a general (or traditional) customary international law argument. To satisfy state practice and *opinio juris* elements, when proof is put forth that a right has risen to the level of customary international law, advocates look not only to the "traditional" evidence, but also to evidence that does not wholly conform to tradition. Evidence relied upon to support a finding that a right is a part of customary international law includes: evidence that the right has been incorporated into numerous national constitutions and general laws; multitudinous United Nations resolutions and declarations that refer to Member States' duties to enforce rights in the UDHR; U.N. resolutions that condemn human rights violations; ICJ dicta that *erga omnes* obligations include obligations derived from "principles and rules concerning the basic rights of the human person"; and domestic court judgments. See OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 85-94 (1991); MALCOLM N. SHAW, *INTERNATIONAL LAW* 54-82 (4th ed. 1997); STEINER & ALSTON, *supra* note 225, at 69-80; MARK E. VILLIGER, *CUSTOMARY INTERNATIONAL LAW AND TREATIES* 3-62 (1985).

282. Louis Henkin, *International Law: Politics, Values and Functions*, in 216 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW, 4 RECEUIL DES COURS 13 (1989). Scholars and jurists agree generally on the identification of the two elements, and on a definition of "customary international law." However, there is disagreement on what constitutes proof of customary international law, or what appropriately serves as evidence of customary international law. For discussions of customary international law and its proof, see generally MARK W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 41-54 (3d ed. 1999); STEINER & ALSTON, *supra* note 225, at 69-80; see also Jeremy Levitt, *Humanitarian Intervention by Regional Actors in Internal Conflicts: The Cases of*

requirement calls for a threshold showing of, at minimum the (a) duration of the practice; (b) uniformity and consistency of the practice; (c) generality and empirical extent of the practice; and (d) conformity of state practice to international standards.²⁸³ For proof of these elements, the Court will look to various sources, including international, regional, and bilateral treaties; international tribunal decisions; and the internal law of relevant states.²⁸⁴

Opinio juris is a psychological element that requires an examination of a State's motives in engaging in a particular act or practice. For the *opinio juris* requirement to be satisfied, a showing must be made that states engage in the practice out of a sense of legal obligation, not because engaging in the practice is convenient or coincidental.²⁸⁵ The following elements must be satisfied for the *opinio juris* element to be met: (a) the rules protecting the right must be legal in nature (legality);²⁸⁶ (b) the right must relate to international and not domestic law; and (c) states must be aware of the articulated right.

Generally, customary international human rights law prohibits the most globally deplored human rights violations, such as genocide, slavery, forced disappearances, murder, torture, prolonged arbitrary imprisonment, systematic racial discrimination, and consistent patterns of gross human rights violations.²⁸⁷ Furthermore, compelling cases have been made for inclusion in the ranks of customary international law such diverse rights as the right to a healthy environment,²⁸⁸ the right to education,²⁸⁹ the right to organize and bargain collectively,²⁹⁰ the right to freedom from self-incrimination,²⁹¹ and the

ECOWAS in Liberia and Sierra Leone, 12 TEMP. INT'L & COMP. L.J. 333, 333 n.1 (1998) (defining customary international law).

283. ANTHONY D'AMATO, INTERNATIONAL LAW (3d ed. 1996).

284. See JANIS, *supra* note 282, at 41-54.

285. BROWNIE, *supra* note 169, at 3. The Statute of the International Court of Justice, article 38, speaks of "a general practice accepted as law." See *id.* *Opinio juris* can be presumed based on, *inter alia*, the basis of evidence of a general practice.

286. This "legality" differs from the general principle of criminal law "legality" discussed *infra* at Subsection VI.C.5.

287. This list is drawn from the RESTATEMENT (THIRD) OF FOREIGN RELATIONS, § 702 (1987) ("The list is not necessarily complete, and is not closed: human rights not listed in this section may have achieved the status of customary international law, and some rights might achieve that status in the future.") *Id.* at comment a; see also James D. Wilets, *International Human Rights Law and Sexual Orientation*, 18 HASTINGS INT'L & COMP. L. REV. 1, 18-19 (1994) (discussing right to be free from discrimination based on sexual orientation as customary international law). It has been convincingly argued that other rights which have become a part of "general international law" include: the right to self-determination of peoples; the right to leave and return to one's country; and the principle of non-refoulement for refugees threatened by persecution. See, e.g., OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 85 (1991).

288. Lee, *supra* note 243.

289. Connie de la Vega, *The Right to Equal Education: Merely a Guiding Principle or Customary International Legal Right?*, 11 HARV. BLACKLETTER L.J. 37 (1994).

290. Leslie Deak, *Customary International Labor Laws and Their Application in Hungary, Poland, and the Czech Republic*, 2 TULSA J. COMP. & INT'L L. 1 (1994).

291. Diane Marie Amann, *A Whipsaw Cuts Both Ways: The Privilege Against Self-Incrimination in an International Context*, 45 UCLA L. REV. 1201, 1251-61 (1998) (discussing self-incrimination rights as customary international law); Daniel J. Steinbock, *The Fifth Amendment at Home and Abroad: A Comment on United States v. Balsys*, 31 U. TOL. L. REV. 209, 222-23 (2000); Jeffrey K. Walker, *A Comparative Discussion of the Privilege Against Self-Incrimination*, 14 N.Y.L. SCH. J. INT'L & COMP. L. 1, 30 (1993) ("[N]early every major legal system recognizes some form of the privilege."); see also COMPARATIVE CRIMINAL PROCEDURE 32-22, 148, 233-34 (John Hatchard et al. eds., 1996)

right of sexual minorities to be free from discrimination.²⁹² Finally, more inclusively, many scholars and some jurists have contended that all rights contained in the UDHR and the ICCPR have become customary international law.²⁹³

A compelling case can be made that the search and seizure right to privacy has risen to the level of customary international law given that the elements of state practice and *opinio juris* have been satisfied. Although the proof may fail since the standard is high, this analysis is instructive as similar arguments must be made with respect to any right that may not be expressly enumerated in the Rome Statute (e.g., other privacy rights, gender and sexual orientation rights, environmental rights), and because persons whose search and seizure privacy interests are affected would argue that the right is a part of the customary international law of human rights, and is thus an "internationally recognized human right" that the Court must enforce.

c. *State Practice as an Element of Customary International Law (Search and Seizure Privacy Right)*

(i) *Duration of the Search and Seizure Privacy Right*

Though a practice need not have been in place for centuries in order to satisfy the duration element of a customary international law proof,²⁹⁴ the search and seizure privacy right easily qualifies as satisfying this element. The notion of the inviolability of the home is traceable to biblical times, for example, in the pronouncement that "[t]heir houses are safe from fear."²⁹⁵ The right has been entrenched in national law for centuries. In the fourteenth century, England enacted laws governing searches and forfeiture of contraband.²⁹⁶ In 1763, the Parliamentarian William Pitt extolled the virtues of

(describing right against compelled self-incrimination in France, Germany, and the United Kingdom).

292. Wilets, *supra* note 287. One commentator, however, has suggested that non-discrimination against sexual minorities has not yet risen to customary international law, but is hopeful of "the eventual development" of such a norm. *Id.* at 19 ("It is, unfortunately, highly unlikely that a court would interpret the criminalization of same-gender private sexual behavior, or other discrimination against sexual minorities, to be a violation of customary international human rights law. However, the eventual development of such a binding customary norm should not be ruled out, particularly since the ICCPR has been ruled to provide this kind of protection for sexual minorities.").

293. See, e.g., Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Pena-Irala*, 22 HARV. INT'L L.J. 53, 69-70 n.75 (1981) (UDHR authoritatively interprets the U.N. Charter and is binding as customary international law); Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1, 17 (1982) (arguing that the UDHR is "a basic component of international customary law, binding on all states, not only on members of the United Nations.").

294. See *North Sea Continental Shelf Cases* (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 44 (Feb. 20) (passage of only a short period of time is not necessarily a bar to the formation of a new rule of customary international law, but the practice must be "both extensive and virtually uniform"); BROWNIE, *supra* note 169, at 5 (no particular duration required so long as consistency and generality present).

295. *Job* 21:9; see also BROWNIE, *supra* note 169, at 3 (discussing the concept of inviolability).

296. NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 23 (1937) (citing 9 EDW. III, ST. II, CH. 11 (1335)); see also Global

the privacy rights and the inviolability of the home.²⁹⁷ In 1765, Lord Camden, in *Entick v. Carrington*,²⁹⁸ struck down a warrant that had been issued to seize papers in a private dwelling.²⁹⁹ The Fourth Amendment to the United States Constitution, passed in 1791, prohibited unreasonable searches and seizures and called for search warrants based on probable cause.³⁰⁰

In the twentieth century, numerous international instruments enshrine the search and seizure privacy right. These instruments include the UDHR, the ICCPR, the European Convention on Human Rights, and other international instruments that articulate the right to privacy in family, home and correspondence.³⁰¹ Further, some aspect of the right to privacy is incorporated into virtually every constitution in the world, and into the general laws and jurisprudence of those countries without written constitutions.³⁰² Both civil law and common law systems boast incorporation of the right, though the right may be construed differently in each of the two systems.³⁰³

Thus, the search and seizure privacy right meets the duration test sufficient to qualify as customary international law.

(ii) *Uniformity and Consistency of the Search and Seizure Privacy Right*

A showing of substantial uniformity and consistency must be shown to meet this prong.³⁰⁴ The search and seizure privacy right has appeared substantially, uniformly, and consistently in various international instruments over the last fifty years.³⁰⁵ The contours of the right can be extracted from the international instruments and domestic constitutional documents containing the right, and can be summarized as follows: (1) though a person's home is

Internet Liberty Campaign, *supra* note 30; HANSARD, PARLIAMENTARY HISTORY OF ENGLAND, *supra* note 2 (quoting 18th Century English Parliamentarian's cries for sanctity of the home from invasions by all, even by the King, as a "man's home is his castle").

297. See *supra* note 2 and accompanying text.

298. 45 All Eng. Rep. 1558-1774 (1765).

299. Lord Camden wrote: "We can safely say there is no law in this country to justify the defendants in what they have done; if there was, it would destroy all the comforts of society, for papers are often the dearest property any man can have." *Id.*

300. U.S. CONST., amend. IV; see also discussion *infra* Subsection VI.C.5.

301. See generally discussion *infra* Parts V and VI (right to privacy provided for in UDHR, ICCPR, ECHR, and other long-standing international and regional human rights instruments and in jurisprudence of international tribunals).

302. See also discussion *infra* Subsection VI.C.5 (discussing the right to privacy in relation to world constitutions).

303. In civil law systems where search and seizure protections are deemed more procedural than substantive, the concept does not offer the substantive standard (for example, probable cause) that is applied in common law jurisdictions. However, this interpretation distinction should not detract from the existence of the right in those two major legal systems.

304. BROWNIE, *supra* note 169, at 3.

305. See discussion *infra* Subsection VI.C.5.

inviolable,³⁰⁶ that inviolability is not absolute; and (2) any interference with that right must be lawful, reasonable and not arbitrary.³⁰⁷

The search and seizure privacy right easily meets the uniformity and consistency test to qualify as customary international law.

(iii) *Generality and Empirical Extent: Treaties and Other Instruments as Evidence of State Practice of the Search and Seizure Privacy Right*

Generality complements the uniformity and consistency requirement. Evidence must be proffered to show that the practice in question is widespread, with minimal abstention or objection by states.³⁰⁸ Evidence of generality can take the form of the quantum of treaties and other international instruments that provide for the search and seizure privacy right. The argument that the search and seizure privacy right has risen to the level of customary international law is bolstered by the inclusion of the right in numerous international and regional human rights treaties,³⁰⁹ and by the enforcement of that right by international and domestic tribunals.

Following is proof of generality, in the form of treaties and other international instruments that provide for search and seizure privacy rights. This section examines the search and seizure privacy rights in the UDHR, the ICCPR, and in other international instruments, and in international tribunals that interpret and apply these instruments.

(a) *International Human Rights Instruments: Interpretations of the Right to Privacy*³¹⁰

(i) *Universal Declaration of Human Rights*³¹¹

The Universal Declaration of Human Rights (UDHR), which was promulgated in 1948 to give meaning to the general human rights provisions of the 1945 U.N. Charter, applies to all members of the United Nations.³¹² The

306. It is questionable whether the inviolability of the office/work place or the inviolability of correspondence has risen to the level of customary international law. However, a full discussion of these issues is beyond the scope of this Article.

307. See also discussion *supra* Section II.B.

308. See BROWNIE, *supra* note 169, at 6.

309. The right is also re-enforced in many multilateral and bilateral non-human rights treaties, such as the Multilateral Legal Assistance Treaties and extradition treaties. For a summary of international law documentation, see John W. Williams, *Research Tips in International Law*, 15 J. INT'L L. & ECON. 1 (1981).

310. The Court may not be bound by the various international human rights law instruments qua instruments. Though the Court could conceivably adopt wholesale interpretations of the right to privacy by other international tribunals, the Court will not likely do so, even though the Rome Statute, like the ICTY and ICTR Statutes, has attempted to incorporate rights contained in the international instruments. See *Prosecutor v. Tadic*, Case No. IT-94-1-T, 7 CRIM. L.F. 139 (1996), ¶¶ 19, 25 ("In drafting the [ICTY] Statute and the Rules every attempt was made to comply with internationally recognized standards of fundamental human rights.").

311. Universal Declaration of Human Rights, *supra* note 24.

312. The 1945 U.N. Charter is a treaty to which all members of the United Nations are a party.

rights enunciated in the UDHR have been invoked, frequently verbatim, in many United Nations, regional, and bilateral human rights treaties, and in national legislation and many world constitutions.

Article 12 of the UDHR provides for privacy rights as follows: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."³¹³ This provision, which was the first modern international enunciation of the search and seizure privacy right, is echoed in the ICCPR, and many other international and regional human rights instruments.

(ii) *International Covenant on Civil and Political Rights*³¹⁴

The ICCPR, which was adopted by the United Nations in 1966 to render UDHR rights enforceable, came into force in 1976, and currently binds 144 States Parties that have adhered to it.³¹⁵ Furthermore, rights contained in the ICCPR have risen to the level of customary international law, and thus bind all States, including those that have not ratified the treaty.³¹⁶

Article 55 of the Charter, which contains a general call for the promotion of human rights, provides that the United Nations shall promote "universal respect for, and observance of, human rights and fundamental freedoms for all." Elucidation of the human rights referred to in the U.N. Charter was left to the Universal Declaration of Human Rights, *supra* note 24, which was promulgated three years later, and other U.N. international instruments such as the ICCPR, *supra* note 25, and the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966 (entered into force Jan. 3, 1976), G.A. Res. 2200A (CCD), U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *reprinted in* 6 I.L.M. 360 (1967) [hereinafter ICESCR]. The International Bill of Human Rights—consisting of the UDHR, the ICCPR and its Optional Protocols, and the ICESCR—are the backbone of the U.N. human rights system.

313. UDHR, *supra* note 24, art. 12.

314. ICCPR, *supra* note 25.

315. The following 144 countries have adhered to the ICCPR by ratification or accession: Afghanistan; Albania; Algeria; Angola; Argentina; Armenia; Australia; Austria; Azerbaijan; Barbados; Belarus; Belgium; Belize; Benin; Bolivia; Bosnia and Herzegovina; Brazil; Bulgaria; Burkina Faso; Burundi; Cambodia; Cameroon; Canada; Cape Verde; Central African Republic; Chad; Chile; Colombia; Congo; Costa Rica; Côte d'Ivoire; Croatia; Cyprus; Czech Republic; Denmark; Dominica; Dominican Republic; Ecuador; Egypt; El Salvador; Equatorial Guinea; Estonia; Ethiopia; Finland; France; Gabon; Gambia; Georgia; Germany; Greece; Grenada; Guatemala; Guinea; Guyana; Haiti; Honduras; Hungary; Iceland; India; Iran; Iraq; Ireland; Israel; Italy; Jamaica; Japan; Jordan; Kenya; South Korea; Kuwait; Kyrgyzstan; Latvia; Lebanon; Lesotho; Libya; Liechtenstein; Lithuania; Luxembourg; Macedonia; Madagascar; Malawi; Mali; Malta; Mauritius; Mexico; Moldova; Monaco; Mongolia; Morocco; Mozambique; Namibia; Nepal; Netherlands; New Zealand; Nicaragua; Niger; Nigeria; Norway; Panama; Paraguay; Peru; Philippines; Poland; Portugal; Romania; Russia; Rwanda; Saint Vincent and the Grenadines; San Marino; Senegal; Seychelles; Sierra Leone; Slovakia; Slovenia; Somalia; South Africa; Spain; Sri Lanka; Sudan; Suriname; Sweden; Switzerland; Syria; Tajikistan; Tanzania; Thailand; Togo; Trinidad and Tobago; Tunisia; Turkmenistan; Uganda; Ukraine; United Kingdom; USA; Uruguay; Uzbekistan; Venezuela; Vietnam; Yemen; Yugoslavia; Zaire; Zambia; Zimbabwe. *See* UNITED NATIONS MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY GENERAL, U.N. Doc. ST/LEG/SER.E/17 (2001); <http://www.unhchr.ch/pdf/report.pdf> (last visited Apr. 21, 2001, updated Mar. 28, 2001). The following three States have signed but not ratified the ICCPR: China, Liberia, and Sao Tomas and Principe. *Id.*

316. *See, e.g.,* Bassiouni, *supra* note 249, at 249 ("When a significant number of states representing the major legal systems of the world have adhered to a given convention, it may become part of customary international law . . . and therefore become binding upon nonsignatory states under

Article 17 of the ICCPR, which echoes the privacy rights provision of the UDHR, provides:³¹⁷

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, or to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

(a) *Human Rights Committee General
Comment on Article 17*

Pursuant to article 28 of the ICCPR, a committee of independent experts, known as the Human Rights Committee,³¹⁸ was formed to oversee implementation of the ICCPR within the States Parties to that treaty.³¹⁹ Pursuant to ICCPR article 40(4), the Human Rights Committee may issue "general comments," which are distributed to States Parties,³²⁰ and which are deemed to be "authoritative interpretations" of the relevant part(s) of the ICCPR that the particular comments address.³²¹ The Human Rights Committee issued a General Comment on ICCPR article 17,³²² which focuses on, *inter alia*, the "right to respect of privacy, family, home and correspondence."³²³ The General Comment on Article 17 ("General Comment") sheds light on how the ICCPR search and seizure privacy right should be interpreted.

First, the General Comment, in clarifying the meaning of the term "home" as contained in article 17, provides that "home" is to be given a broad meaning and includes not only a place where a person resides, but also the place where the person works.³²⁴ The General Comment provides: "The term 'home' in English, 'manzel' in Arabic, 'zhùzhái' in Chinese, 'domicile' in French, 'zhilishche' in Russian, and 'domicilio' in Spanish, as used in article 17 of the [ICCPR], is to be understood to indicate the place where a person resides or carries out his usual occupation."³²⁵

Second, though the ICCPR on its face does not expressly place limitations on the privacy right, as does, for example, the European

Article 38(1)(b) [of the Statute of the International Court of Justice].") (citations omitted).

317. Identical language is found in article 14 of the United Nations Convention on Migrant Workers, U.N. Doc. A/Res/45/158 (1991).

318. ICCPR, *supra* note 25, art. 28.

319. *See id.*, art. 40 (calling on ICCPR States Parties to submit periodic reports to the Human Rights Committee on implementation of ICCPR rights in their territories).

320. *Id.*, art. 40(4).

321. *See* NOWAK, *supra* note 30, art. 30 at XXIV (Introduction) (announcing the treatment of Human Rights Committee General Comments as "authoritative interpretations" of ICCPR provisions).

322. *General Comment*, U.N. GAOR Hum. Rts. Comm., 43rd Sess., Supp. No. 40, at 181, U.N. Doc. A/43/40 (1988) (discussing the meaning and ramifications of certain terms in ICCPR, article 17).

323. *Id.*

324. *General Comment*, *supra* note 322, para. 5.

325. *Id.*, para. 5.

Convention on Human Rights,³²⁶ the General Comment anticipates that privacy rights are not absolute.³²⁷

Third, the General Comment gives meaning to the term “unlawful”.³²⁸ “The term ‘unlawful’ means that no interference can take place except in cases envisaged by the law. Interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant.”³²⁹

Finally, the General Comment defines “arbitrary interference” as an expression that can “extend to interference provided for under the law,” and “[t]he introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the [ICCPR] and should be, in any event, reasonable in the particular circumstances.”³³⁰

Thus, it can be concluded that according to the Human Rights Committee, the search and seizure privacy right exists, including as relates to the home.³³¹ The right requires that States Parties adopt legislative and other measures to prohibit interference with privacy rights related to the home or business, that no interference to the privacy of home or business should occur unless envisaged by law, and that the national law and any interference with the right must be in accordance with the ICCPR.

(iii) *Convention on the Rights of the Child*

The Convention on the Rights of the Child,³³² which is the most widely ratified international human rights law treaty in existence, with 192 Parties,³³³ confirms the expansiveness of state practice regarding the search and seizure privacy right as a customary international law norm. Article 16 of the Convention on the Rights of the Child provides: “No child shall be subjected to arbitrary interference with his or her privacy, family, home or correspondence, nor to attacks upon his or her honour and reputation. The child has the right to the protection of the law against such interference or attacks.” As its terms repeat almost verbatim the corresponding ICCPR

326. European Convention, *supra* note 132; see also NOWAK, *supra* note 30, at 290-94 (discussing limitations or restrictions on the ICCPR, article 17 right to privacy).

327. E.g., *General Comment*, *supra* note 322, paras. 7-9 (“As all persons live in society, the protection of privacy is necessarily relative. . . . Even with regard to interferences that conform to the [ICCPR], relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted. . . . States parties are under a duty themselves not to engage in interferences inconsistent with article 17.”).

328. *Id.*, para. 3.

329. *Id.*

330. *Id.*, para. 4 (noting that “[s]earches of a person’s home should be restricted”).

331. See *id.*, para. 8.

332. Children’s Convention, *supra* note 26. The Convention defines “child” as “every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.” *Id.* Even though the ICC has no jurisdiction to try persons who are below the age of eighteen when they allegedly commit punishable crimes, it is conceivable that a person below the age of majority would be the target of an unlawful search or seizure, a person under investigation, or a suspect.

333. The only two countries that have not ratified the Children’s Convention are the United States and Somalia. *Id.*

provision,³³⁴ there is no reason to believe that the intent of the respective framers materially differed, or that a different meaning would be given by the U.N. Committee on the Rights of the Child or any tribunal charged with interpreting the privacy right under the two treaties.

(b) *Regional International Human Rights Law
Systems and Instruments*

Numerous regional international human rights law instruments provide for the search and seizure privacy right. This fact further bolsters the argument that the state practice element has been satisfied. Discussed below are two major regional schemes, which exist in Europe and in the Americas, respectively.³³⁵

(i) *The European Human Rights System*

The 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention)³³⁶ which has been ratified by nations throughout Europe,³³⁷ provides for the search and seizure privacy right. Article 8(1) provides: "Everyone has the right to respect for his private and family life, his home and his correspondence."³³⁸

334. *E.g.*, ICCPR, *supra* note 25, arts. 17(1)-(2) (containing language virtually identical to privacy provision of the Children's Convention).

335. In addition to the European and Inter-American schemes for the safeguarding of human rights, schemes exist in Africa, among the Commonwealth of Independent States, and in the Arab world. The African system revolves around the Organization of African Unity, which promulgated the African Charter on Human and Peoples' Rights. Adopted June 27, 1981, O.A.U. Doc. CAB/LEG/67/3/Rev. 5 (1981) (entered into force Oct. 21, 1986), *reprinted in* 21 I.L.M. 58 (1982) [hereinafter African Charter]. The African Charter does not expressly provide for the right to privacy in the search and seizure context.

The Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States provides, at article 9(1): "Everyone shall have the right to respect for his private and family life, his home and his correspondence." Article 9(2) contains limitations, similar to those contained in article 8(2) of the European Convention on Human Rights. These limitations do not detract from the contribution to the finding of state practice.

The Arab Charter on Human Rights, article 17 provides: "Private life is sacred, and violation of that sanctity is a crime. Private life includes family privacy, the sanctity of the home, and the secrecy of correspondence and other forms of private communications."

336. European Convention, *supra* note 132.

337. The European Convention provides primarily for civil and political rights. Economic, social and cultural rights in Europe are provided for in the European Social Charter, 529 U.N.T.S. 89, Europe T.S. 35, 1965 (entered into force Feb. 26, 1965) [hereinafter European Social Charter]. The European Convention and European Social Charter supplement the human rights safeguards under the United Nations human rights instruments. Many European states are parties to the various United Nations human rights treaties, and have also signed the major U.N. human rights non-treaty instruments. All European States are bound by human rights principles that constitute customary international law.

338. This right is subject to some reasonable exercise of the government's police power, as noted in Article 8(2) of the European Convention. European Convention, *supra* note 132, art. 8(2), provides:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The European Court, which is charged with resolving disputes arising under the European Convention, has ruled that the right to privacy in the home is inviolable, and has sought to define the parameters of the right.³³⁹ In *Huvig v. France*,³⁴⁰ the European Court recognized the right to privacy in the criminal procedure context as it applied article 8 of the European Convention to a search (telephone tap) and seizure (the tapped conversation) pursuant to a search warrant in France. *Huvig* involved a French couple under investigation for tax evasion. A French judge issued a warrant calling for monitoring and transcription of the couple's telephone conversations. The monitoring spanned twenty-eight hours over two days. The couple challenged the telephone taps before the European Commission, which held that article 8 had been violated.³⁴¹

The *Huvig* Court applied a two-step process.³⁴² First, the Court asked whether the alleged interference with article 8 rights was "in accordance with law," and second, turning to article 8(2), the Court examined the permissible limitations or restrictions on the right to privacy contained in article 8(1). The Court found that though the warrant issued was authorized by law, article 8 was violated as the contested French law permitted the police too much discretion to determine the scope of the interference.³⁴³

In *Crémieux v. France*,³⁴⁴ the European Court again found a breach of the article 8 search and seizure privacy right. Over three years, pursuant to the French Customs Code, government officials conducted eighty-three investigative searches of complainant Mr. Crémieux's home, office, and other locations, and seized papers sought to be used in criminal proceedings against Mr. Crémieux. The court noted the French government's concession "that there had been an interference with Mr. Crémieux's right to respect for his private life" and acknowledged the European Commission's earlier finding that "there had been an interference with [Mr. Crémieux's] right to respect for his home."³⁴⁵ The court then turned to article 8(2), which details limitations on the rights articulated in article 8(1). Under article 8(2), the court examined whether the interference under article 8(1) was "in accordance with the law" as required by article 8(2), and found it unnecessary to answer that question as

339. The European Court has ruled that the right to privacy of the "home" extends to "business premises." *Niemietz v. Germany*, 251 Eur. Ct. H.R. (ser. A) (1992) (respect for private life must encompass the right to develop relationships with others, including relations of a business or professional nature).

340. *Huvig v. France*, 176-B Eur. Ct. H.R. (ser. A) (1990).

341. The couple was convicted even though the tapped conversations were not offered as evidence against them at trial. *Id.*

342. The two-step process had been applied by the Court in a prior article 8 case. *Klass and Others v. Federal Republic of Germany*, Eur. Ct. H.R., 28 Eur. Ct. H.R. (ser. A) (1978). *Klass* involved a challenge to certain German laws that permitted surveillance without obliging governmental authorities to notify the persons concerned after the surveillance occurs, and for excluding any remedy before the Courts against the ordering and execution of such measures. The Court found that there was an interference with article 8 rights, but that the interference was justified in a democratic society in the interests of national security and for the prevention of disorder or crime under article 8(2). *Id.*

343. *Huvig v. France*, 176-B Eur. Ct. H.R. (ser. A) (1990).

344. *Crémieux v. France*, 256-B Eur. Ct. H.R. (ser. A) (1993).

345. *Id.*, ¶ 31.

the interference complained of was "incompatible with Article 8 in other respects."³⁴⁶ The court found that the interference was in furtherance of legitimate government interests in "the economic well-being of the country." However, the court nevertheless found a breach of article 8 because "in the absence of any requirement of a judicial warrant the restrictions and conditions provided for in law . . . appear too lax and full of loopholes for the interferences with [Mr. Crémieux's] rights to have been strictly proportionate to the legitimate aim pursued." Such searches might be permissible for prosecutorial purposes, but they could only be conducted in accordance with the French Constitution. Article 66 of the French Constitution renders the judiciary responsible for protecting the liberty of the individual regarding the inviolability of the home.³⁴⁷ The court went further to add that legislation and procedures governing searches and seizures must afford "adequate and effective safeguards against abuse."³⁴⁸

(ii) *The Inter-American Human Rights System*

The regional human rights regime in the Americas safeguards privacy as well. The regional system is based primarily on three instruments: the Charter of the Organization of American States;³⁴⁹ the American Declaration of the Rights and Duties of Man;³⁵⁰ and the American Convention on Human Rights (American Convention).³⁵¹ Both the American Declaration and the American Convention contain provisions protecting the right to privacy. Article IX of American Declaration provides that ³⁵² "[e]very person has the right to the inviolability of his home," and article X provides that "[e]very person has the right to the inviolability and transmission of his correspondence." The American Convention was promulgated subsequent to the American Declaration to give binding force to the rights contained in the declaration. Article 11 of the American Convention³⁵³ provides:

Every person has the right to have his honor respected and his dignity recognized.

346. *Id.*, ¶ 34.

347. *Id.*, ¶ 4; *see also id.*, ¶ 32 (quoting Constitutional Council decision on § 89 of the Budget Act of 1984). The Court continued: "Provision must be made for judicial participation in order that the judiciary's responsibility and supervisory power may be maintained in their entirety." *Id.*

348. Adequate and effective safeguards might include a judicial warrant, non-lax restrictions and conditions provided by law, and procedures in which interference with individuals' rights are strictly proportionate to the legitimate governmental aim. *See generally id.* (citing *Klass and Others v. Federal Republic of Germany*, Eur. Ct. H.R., 28 Eur. Ct. H.R. (ser. A) (1978)).

349. Charter of the Organization of American States, 2 U.S.T. 2394, 119 U.N.T.S. 3 (entered into force Dec. 13, 1951) [hereinafter OAS Charter].

350. O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992) [hereinafter American Declaration].

351. American Convention on Human Rights, O.A.S.T.S. No. 36, OEA/Ser. L/V/II.23 doc. rev. 2, 1978 (entered into force July 18, 1978) [hereinafter American Convention].

352. Article V of the American Declaration provides: "Every person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life." American Declaration, *supra* note 350, art. V.

353. American Convention, *supra* note 351.

No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.

Everyone has the right to the protection of the law against such interference or attacks.

The Inter-American Commission on Human Rights has addressed search and seizure privacy rights issues. In *Garcia v. Peru*,³⁵⁴ it was alleged that on April 5, 1992, the date on which Peruvian President Alberto Fujimori announced to the public that he had suspended the constitution,³⁵⁵ soldiers, with no search warrant, forcibly entered the home of former Peruvian President Dr. Alan Garcia Perez, held his family under house arrest for several days, and seized some of his private family papers.³⁵⁶ The Commission recognized the existence of the right to privacy and the inviolability of the home, but also acknowledged limitations, in that privacy must "give way" in the face of a well-substantiated search warrant issued by a competent judicial authority, specifying the reasons for the measure being adopted, the place to be searched, and the objects to be seized.³⁵⁷ Though the 1979 constitution of Peru provides that homes and private papers shall be inviolable except "when an order has been issued by a competent judicial authority authorizing the search, explaining its reasons and, where appropriate, authorizing the seizure of private papers, while respecting the guarantees stipulated by law," no such warrant had been issued in this case. The Commission found a violation of the right to the inviolability of the home.³⁵⁸

Similarly, the Inter-American Commission of Human Rights found a violation of the right to privacy in the case of *Ms. X and Y v. Argentina*,³⁵⁹ in which the complainants (mother and daughter) contended that their right to privacy was violated by body-cavity searches, to which the complainants were subjected when they visited their husband and father in an Argentine prison. The Commission ruled that article 11 of the Inter-American Convention protects the physical and moral integrity of the person and specifically that article 11(2) prohibits "arbitrary or abusive interference" with a person's private life.³⁶⁰

354. Report No. 1/95, Case 11.0006, Inter-Am. Cm.H.R. 71, OEA/Ser.L/V/II.88, Doc. 9 rev. (1995).

355. On that day, President Fujimori also announced that he had dissolved the Senate and House of Deputies, and took over legislative powers. He also declared that the judiciary was in recess. *Id.*

356. The seized private papers included such items as identification papers, passports, property deeds, tax declarations and legal documents used in the defense of the former President in the case brought against him for the crime of unlawful enrichment. *Id.*

357. *Id.*

358. The Court found that the exclusionary rule is a natural part of the right to privacy, and the inviolability of the home is part of the guarantee of a fair hearing under article 8(1). *Id.*

359. 81st Sess. Annual Report 1996, Inter-American Commission on Human Rights, Washington, D.C., Mar. 14 1997, Case 10.506, Rep. No. 38/96 (1997).

360. The searches in *Ms. X & Y v. Argentina* were arguably conducted for crime detection purposes, as the searches were intended to quash items being smuggled into the prison through bodily cavities. The Commission ruled: "The notion of 'arbitrary interference' refers to elements of injustice, unpredictability and unreasonableness," and that an analysis of these factors is appropriate in an analysis of "the necessity, reasonableness, and the proportionality of the searches and inspections." *Id.*, para. 92.

(c) *International Criminal Statutes*(i) *The ICTY Statute*

The issue of whether an accused person is to be afforded search and seizure privacy rights arose before the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the case of *Prosecutor v. Mucic*.³⁶¹ In that case, the accused were charged with perpetrating international crimes in Celebici, in Bosnia and Herzegovina. One of the accused persons, Mr. Mucic, had relocated to Austria. ICTY Prosecutors had requested that Austrian authorities search for evidence related to the alleged crimes. Austrian authorities, upon a warrant issued by an Austrian court, searched Mr. Mucic's Vienna apartment and seized incriminating evidence, including various identification and travel documents, which they sought to use against him at trial. Though conceding that "a number of irregularities" occurred in the search of Mr. Mucic's apartment and that "actions were taken" that violated Austrian law,³⁶² the prosecution contended that the search itself was lawful.

After hearing argument, the ICTY noted that its rules provide a "liberal and less technical rule relating to the admissibility of evidence,"³⁶³ and that the court would adhere to the general rule contained in the ICTY Rule 89(c)³⁶⁴ that calls for the admission of any evidence that is relevant and has probative value.³⁶⁵ However, the court stated that it "reserves the right to exercise its discretion to exclude any evidence admitted if it is satisfied that it is obtained by means contrary to internationally protected human rights."³⁶⁶ Though the ICTY admitted at trial the evidence that had been seized contrary to Austrian law,³⁶⁷ the ICTY confirmed that accused persons shall be afforded the search and seizure right to privacy, and that it is appropriate for the ICTY to determine whether that right had been violated.³⁶⁸

361. *Prosecutor v. Mucic*, Case No. IT-96-21, Decision on the Tendering of Prosecution Exhibits 104-108 (Trial Chamber, Nov. 16, 1998).

362. *Id.*, ¶ 2 (Feb. 9, 1998).

363. *Id.*, ¶ 13.

364. ICTY Rule 89(c) provides "A Chamber may admit any relevant evidence which it deems to have probative value."

365. The Trial Chamber noted: "It would be consistent with the Rules that where evidence is relevant and has probative value, it is immaterial how it has been obtained. Except, that is, if it is obtained by methods which cast doubts on its reliability, or if its admission would be antithetical to, and would seriously damage the integrity of the proceedings." *Mucic*, ¶ 19 (Feb. 9, 1998). Further, the court concluded that it was "not satisfied that the method by which the evidence was obtained amounts to such conduct as to induce the exercise of our discretion to exclude it." The court noted that it was "of the opinion that it would constitute a dangerous obstacle to the administration of justice if evidence which is relevant and of probative value could not be admitted merely because of a minor breach of procedural rules which the [court] is not bound to apply." *Id.*, ¶ 20 (Feb. 9, 1998).

366. *Prosecutor v. Mucic*, Case No. IT-96-21, Decision on the Tendering of Prosecution Exhibits 104-108 (Trial Chamber, Nov. 16, 1998; Feb. 9, 1998), ¶ 23.

367. *Id.*, ¶ 20 (Feb. 9, 1998).

368. Unfortunately, the ICTY shed little light on the substance or parameters of the search and seizure privacy right, as the ICTY ruling did not make clear whether (a) the Vienna search conducted with irregularities did not violate "internationally protected human rights," or (b) the Vienna search conducted with irregularities violated "internationally protected human rights," but the Court exercised

(ii) *The ICTR Statute*

The International Criminal Tribunal for Rwanda (ICTR) was recently faced with a search and seizure privacy issue involving the prosecution of genocide suspect Mr. Jérôme Bicomumpaka, who had been the Rwandan Minister of Foreign Affairs.³⁶⁹ In April 1999, he was arrested in Cameroon on charges that he used his position to organize and perpetrate massacres against the Tutsi minority in Rwanda during the 1994 genocide. During the arrest, certain documents belonging to him were seized by Cameroonian authorities. Though the documents were not turned over to the prosecution and were not sought to be used against him in his ICTR prosecution, the existence of search and seizure privacy rights was arguably reaffirmed. In March 2000, the ICTR ruled, *inter alia*, that the accused person had waived his search and seizure rights during the seizure.³⁷⁰

(d) *States' Internal Law as Evidence of State Practice: Constitutions of the World*

Safeguarding the search and seizure right to privacy is not a Western concept, but a concept that reflects laws in place in countries in every corner of the globe, regardless of the countries' respective regions or political or economic systems.³⁷¹ Without exception, there is some form of safeguard for the right to privacy in every jurisdiction surveyed. Virtually every country of the world that has a written constitution, including nations that participated in the Rome Conference and that signed and/or ratified the Rome Statute,³⁷² and

its discretion in the interests of justice and admitted the unlawfully obtained evidence. Thus, it can be argued that it is unclear whether the ICTY ruled that the right to privacy in the context of searches and seizures is an "internationally protected human right." For a discussion of the relationship between the ICTY use of the term "internationally protected human rights" and the Rome Statute use of the term "internationally recognized human rights," see *supra* note 242 and accompanying text.

369. Prosecutor v. Jérôme Bicomumpaka, Case Nos. ICTR-99-49-DP, ICTR-99-50-I (1999).

370. See Africa News Service, *Tribunal Judge Orders Restitution of Suspect's Personal Effects*, 2000 WL 15974542; Mary Kimani, *Tribunal Judge Orders Restitution of Suspect's Personal Effects*, at <http://www.internews.org/projects/ICTRnewsMar00.html#mar10> (Judge Gueney) (Mar. 6, 2000).

371. This Part of the Article examines the law of countries throughout the world that provide for the search and seizure right to privacy. These countries represent all inhabited continents, and all social, political, ethnic, cultural, and economic groups in existence. See, e.g., *infra* notes 372-86 and accompanying text (citing constitutional provisions for search and seizure right to privacy in almost 190 different countries).

372. Of the approximately 190 countries (including 188 Member States of the United Nations and several non-Member States, such as Switzerland) that were eligible to participate in the Rome Conference, 160 States participated. *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, July 17, 1998, at <http://www.un.org/law/icc/statute/finalfra.htm>. As of May 2001, 139 States have signed and 32 States have adhered to the Rome Statute by ratification or accession. *Id.* Antigua and Barbuda, the Bahamas, Gambia, Guyana, Mongolia, Nauru, Saint Lucia, and Yugoslavia signed the Rome Statute but did not participate in the Rome Conference. Belize and Fiji signed and ratified the Rome Statute but did not participate in the Rome Conference. Dominica did not sign the Rome Statute but adhered by accession.

Following is a list of all States that participated in the Rome Conference, with an asterisk (*) indicating that the State has signed the Rome Statute, and with a notation if the State has adhered to the Rome Statute: Afghanistan; *Albania; *Algeria; *Andorra (ratified); *Angola; *Argentina (ratified);

that have adhered to the ICCPR,³⁷³ expressly offers constitutional privacy safeguards at least as relates to the inviolability of the home.³⁷⁴ In many cases,

*Armenia; *Australia; *Austria (ratified); Azerbaijan; *Bahrain; *Bangladesh; *Barbados; Belarus; *Belgium (ratified); *Benin; *Bolivia; *Bosnia and Herzegovina; *Botswana (ratified); *Brazil; Brunei; *Bulgaria; *Burkina Faso; *Burundi; *Cambodia; *Cameroon; *Canada (ratified); Cape Verde; *Central African Republic; *Chad; *Chile; China; *Colombia; *Comoros; *Congo (Brazzaville); *Congo (Kinshasa); *Costa Rica; *Côte d'Ivoire; *Croatia (ratified); Cuba; *Cyprus; *Czech Republic; *Denmark; *Djibouti; Dominica (acceded); *Dominican Republic; *Ecuador; *Egypt; El Salvador; *Eritrea; *Estonia; Ethiopia; *Finland (ratified); *France (ratified); *Gabon (ratified); *Georgia; *Germany (ratified); *Ghana (ratified); *Greece; Guatemala; *Guinea; *Guinea-Bissau; *Haiti; Holy See; *Honduras; *Hungary; *Iceland (ratified); India; Indonesia; *Iran; Iraq; *Ireland; *Israel; *Italy (ratified); *Jamaica; Japan; *Jordan; Kazakhstan; *Kenya; Korea, North; Korea, South; *Kuwait; *Kyrgyzstan; Laos; *Latvia; Lebanon; *Lesotho (ratified); *Liberia; Libya; *Liechtenstein; *Lithuania; *Luxembourg (ratified); *Macedonia; *Madagascar; *Malawi; Malaysia; *Mali (ratified); *Malta; *Marshall Islands (ratified); Mauritania; *Mauritius; *Mexico; *Moldova; *Monaco; *Morocco; *Mozambique; *Namibia; Nepal; *Netherlands; *New Zealand (ratified); Nicaragua; *Niger; *Nigeria; *Norway (ratified); *Oman; Pakistan; *Panama; *Paraguay (ratified); *Peru; *Philippines; *Poland; *Portugal; Qatar; *Romania; *Russian Federation; Rwanda; *Samoa; *San Marino (ratified); *Sao Tome and Principe; Saudi Arabia; *Senegal (ratified); *Sierra Leone (ratified); Singapore; *Slovakia; *Slovenia; *Solomon Islands; *South Africa (ratified); *Spain (ratified); Sri Lanka; *Sudan; Swaziland; *Sweden; *Switzerland; *Syria; *Tajikistan (ratified); *Tanzania; *Thailand; Togo; *Trinidad and Tobago (ratified); Tunisia; Turkey; *Uganda; *Ukraine; *United Arab Emirates; *United Kingdom; *USA; *Uruguay; *Uzbekistan; *Venezuela (ratified); Vietnam; Yemen; *Zambia; *Zimbabwe. See *Rome Statute of the International Criminal Court, Ratification Status* (last visited May 19, 2001), at <http://www.un.org/law/icc/statute/status.htm>.

373. For a list of all countries that have adhered to the ICCPR, see *supra* note 315.

374. See, e.g., AFG. CONST. ch. 3, art. 44; ALB. CONST. pt. 2, ch. I, art. 37; ALG. CONST. ch. 4, art. 40; ANDORRA CONST. tit. II, ch. III, art. 15; ANGL. CONST. pt. II, art. 24; ANT. & BARB. CONST. ch. II, art. 10; ARG. CONST., 1st pt., ch. I, art. 18; ARM. CONST. ch. 2, art. 21; AUS. CONST. (1988 Prot. of Pers. Freedom) art. 1(1); AZER. CONST. pt. II, ch. III, art. 33(1); BAH. CONST. ch. III, art. 21; BHR. CONST. pt. 3, art. 25; BANGL. CONST. pt. III, art. 43(a); BARB. CONST. ch. III, §11(b); BELR. CONST. §II, art. 29; BELG. CONST. tit. II, art. 15; BELIZE CONST. pt. II, art. 9(1); BENIN CONST. tit. II, art. 20; BOL. CONST. pt. I, tit. 2, art. 21; BOSN. & HERZ. CONST. art. II, 3(f); BOTS. CONST. ch. II, art. 9(1); BRAZ. CONST. tit. II, ch. I, art. 5, § XI; BULG. CONST. ch. II, art. 33(1) & ch. I, 17(1); BURK. FASO CONST. tit. I, art. 6; BURUNDI CONST. tit. III, art. 23; CAMBODIA CONST. ch. III, art. 40; CAMEROON CONST., Preamble; CAN. CONST. pt. 1, art. 8; CAPE VERDE CONST. pt. II, tit. II, ch. I, art. 40(1); CENT. AFR. REP. CONST. tit. I, art. 14; CHAD CONST. tit. II, ch. I, art. 42; CHILE CONST. ch. III, art. 19(5); COLOM. CONST. tit. II, ch. I, art. 28; COMOROS CONST., Preamble; CONGO (BRAZAVILLE) CONST. tit. II, art. 24; CONGO (KINSHASA) CONST. tit. II, art. 24; COSTA RICA CONST. tit. IV, art. 23; CROAT. CONST. III(2), art. 34; CUBA CONST. ch. VII, art. 56; CYPRUS CONST. prop. I(B)(8); CZECH REP. CONST. (1992), art. 3; DEN. CONST. pt. VIII, art. 72; DJIB. CONST. tit. II, art. 12; DOMINICA CONST. ch. I, art. 7(1); DOM. REP. CONST. tit. II, §I, art. 8(3); ECUADOR CONST., tit. III, ch. 2, art. 23(12); EGYPT CONST. pt. 3, art. 44; EL SAL. CONST. tit. II, ch. I, §1, art. 20; EQ. GUINEA CONST. tit. I, art. 13(g); ERI. CONST. ch. II, art. 18(2)(a); EST. CONST. ch. II, art. 33; ETH. CONST. ch. 3, pt. 1, art. 26(1); F.R.G. CONST. ch. I, art. 13(1); FIJI CONST. ch. 4, art. 26(1); FIN. CONST. art. II, § 8; GABON CONST. art. 1(12); GAM. CONST. ch. IV, art. 23(1); GEOR. CONST. ch. 2, art. 20(2); GHANA CONST. ch. 5, art. 18(2); GREECE CONST. pt. II, art. 9(1); GREN. CONST. ch. I, art. 7(1); GUAT. CONST. tit. II, ch. I, art. 23; GUINEA CONST. tit. II, art. 12; GUINEA-BISSAU CONST. tit. II, art. 38; GUY. CONST. pt. 1, tit. 1, ch. 3, art. 40(1); HAITI CONST. tit. III, ch. II, §J, art. 43; HOND. CONST. tit. III, ch. II, art. 99; HUNG. CONST. ch. XII, art. 59(1); ICE. CONST. 1944/95 VI, art. 71; IRAN CONST. ch. III, art. 22; IRAQ CONST. ch. III, art. 22(c); IR. CONST. art. 40(5); ISRAEL CONST. art. 20(a)-(b); ITALY CONST. pt. 1, tit. 1, art. 14; JAM. CONST. ch. III, art. 19; JAPAN CONST. ch. III, art. 35; JORDAN CONST. ch. 2, art. 10; KAZ. CONST. §II, art. 25(1); KENYA CONST. ch. 5, § 76(1); KIRIBATI CONST. ch. II, art. § 9(1); KUWAIT CONST. pt. III, art. 38; KYRG. CONST. ch. II, §2, art. 16(2); LAOS CONST. ch. III, art. 29; LAT. CONST. §8, art. 96; LEB. CONST. pt. I, ch. 2, art. 14; LESOTHO CONST. ch. II, art. 10(1); LIBER. CONST. ch. III, art. 16; LIBYA CONST., ch. 1, art. 12; LIECH. CONST. ch. IV, art. 32; LITH. CONST. ch. 2, art. 24; LUX. CONST. ch. II, art. 15; MACED. CONST. 1991 §II(1), art. 26; MADAG. CONST. tit. II, art. 13; MALAWI CONST. ch. IV, art. 21(1)(a); MALAY. CONST. pt. II, art. 13; MALI CONST. tit. I, art. 6; MALTA CONST. ch. IV, art. 38(1); MARSH. IS. CONST. art. II, §3(1); MAURITANIA CONST. (tit. I, art. 13; MAURITIUS CONST. ch. II, art. 9(1); MEX. CONST. tit. I, ch. I, art. 16; MICR. CONST. art. IV § 5; MOLD.

the coverage is offered even more broadly.³⁷⁵ Even countries that have no written constitution offer privacy right coverage through their general laws, substantive or procedural criminal laws, or evidence laws.³⁷⁶

CONST. ch. II, art. 29(1); MONACO CONST. tit. III, art. 21; MONG. CONST. ch. 2, art. 16(13); MOROCCO CONST. tit. I, art. 10; MOZAM. CONST. ch. IV, art. 104; MYAN. CONST. ch. II, art. 160; NAMIB. CONST. ch. III, art. 13(1); NAURU CONST. pt. II, art. 9(1); NEPAL CONST. pt. 3, art. 22; NETH. CONST. ch. I, art. 12(1); NICAR. CONST. tit. IV, ch. I, art. 26(2); NIGER CONST. tit. II, art. 20; NIG. CONST. ch. IV, art. 37; NOR. CONST. §B, art. 102; N. KOREA CONST. ch. 5, art. 79; N.Z. CONST. (1990 Bill of Rights Act) pt. II, art. 21; OMAN CONST. ch. 3, art. 27; PAK. CONST. pt. II, ch. I, art. 14(1); PALAU CONST. art. IV § 4; PAN. CONST. tit. III, ch. 1, art. 26; PAPUA N.G. CONST. pt. III, div. III, subdiv. C, art. 44; PARA. CONST. tit. II, art. 34; P.R.C. CONST. ch. 2, art. 39; PERU CONST. tit. I, ch. I, art. 2(9); PHIL. CONST. art. III, §2; POL. CONST. (1997) ch. II, art. 50; PORT. CONST. pt. I, tit. II, ch. I, art. 34(1); QATAR CONST. (1973) pt. 3, art. 12; ROM. CONST. tit. II, ch. II, art. 27(1); RUSS. CONST. §1, ch. 2, art. 25; RWANDA CONST. tit. II, art. 22; ST. KITTS & NEVIS CONST. ch. II, art. 9(1); ST. LUCIA CONST. ch. I § 7(1); ST. VINCENT Ch. I § 7(1); SÃO TOMÉ & PRINCÍPE CONST. pt. II, tit. II, art. 24; SAUDI ARABIA CONST. (1992) ch. 5, art. 37; SEN. CONST. tit. II, art. 13; SEY. CONST. ch. III, pt. I, art. 20(1)(a); SIERRA LEONE CONST. ch. III, art. 22(1); SLOVK. CONST. ch. 2, §1, art. 21(1); SLOVN. CONST. §II, art. 36; SOLOM. IS. CONST. ch. II, art. 9(1); SOMAL. CONST. ch. II, art. 29; S. AFR. CONST. ch. 2, art. 14(a); S. KOREA CONST. ch. II, art. 16; SPAIN CONST. ch. II, §1, art. 18(2); SUDAN CONST. pt. II, ch. I, art. 29(2); SURIN. CONST. ch. V, art. 17(2); SWAZ. CONST. ch. II, art. 9(1); SWED. CONST. ch. 2, art. 6; SWITZ. CONST. tit. II, art. 13(1); SYRIA CONST. ch. I, pt. IV, art. 31; TAJ. CONST. ch. 2, art. 22; TANZ. CONST. pt. 3, art. 13; THAIL. CONST. (1991) ch. III, § 35; TOGO CONST. tit. II(1), art. 28; TONGA CONST. ch. 2, pt. 1, cl. 16; TRIN. & TOBAGO CONST. ch. I, pt. 1, art. 4(a); TUNIS. CONST. ch. I, art. 9; TURK. CONST. pt. II, ch. II, §IV, art. 21; TURKM. CONST. §2, art. 22; TUVALU CONST. pt. II, div. 3, subdiv. A, § 21(1)(g),(h); UGANDA CONST. ch. 4, art. 27(1)(a),(b); UKR. CONST. ch. II, art. 30; U.A.E. CONST. ch. 3, art. 36; U.S. CONST. amend. IV; URU. CONST. §2, ch. I, art. 11; UZB. CONST. pt. 2, ch. 7, art. 27; VANUATU CONST. ch. 2, pt. 1, art. 5(1)(j); VENEZ. CONST. tit. III, ch. III, art. 47; VIETNAM CONST. ch. V, art. 73; YEMEN CONST. pt. II, art. 51; YUGOSLAVIA CONST. § 2, art. 31; ZAIRE, CONST. tit. II, art. 22; ZAMBIA CONST. pt. III, arts. 11(d) & 17(1); ZIMB. CONST. ch. III, arts. 11(c) & 17(1).

375. In addition to protecting the inviolability of the home, many constitutions safeguard other privacy rights, including the right to privacy in family life, communications, or correspondence. *See, e.g.*, AFG. CONST. ch. 3, art. 45; ARG. CONST., 1st pt., ch. I, art. 18; BOSN. & HERZ CONST. art. II, 3(f); BURK. FASO CONST. tit. I, art. 6; BURUNDI CONST. tit. III, art. 23; CAMBODIA CONST. ch. III, art. 40; CHILE CONST. ch. III, art. 19(5); COSTA RICA CONST. tit. IV, art. 24; DEN. CONST. pt. VIII, art. 72; EL SAL. CONST. tit. II, ch. I, §1, art. 24; GHANA CONST. ch. 5, art. 18(2); GUINEA CONST. tit. I, art. 12; HUNG. CONST. ch. XII, art. 59(1); ICE. CONST. 1944/95 VI, art. 71; KUWAIT CONST. pt. III, art. 38; LIBER. CONST. ch. III, art. 16; MADAG. CONST. tit. II, art. 13; MALAWI CONST. ch. IV, art. 21(1)(b)-(c); MALDIVES CONST. ch. II, art. 20; MALI CONST. tit. I, art. 6; MEX. CONST. tit. I, ch. I, art. 16; MONG. CONST. ch. 2, art. 16(13); MOZAM. CONST. ch. IV, art. 104; NAMIB. CONST. ch. III, art. 13(1); NEPAL CONST. pt. 3, art. 22; N.Z. CONST. (1990 Bill of Rights Act) pt. II, art. 21; NICAR. CONST. tit. IV, ch. I, art. 26(2); NIGER CONST. tit. II, art. 22; NIG. CONST. ch. IV, art. 37; OMAN CONST. ch. 3, art. 30; ; PAPUA N.G. CONST. pt. III, div. III, subdiv. C, art. 49; PARA. CONST. tit. II, art. 36; P.R.C. CONST. ch. 2, art. 40; PORT. CONST. pt. I, tit. II, ch. I, art. 36(1); RWANDA CONST. tit. II, art. 22; ; SÃO TOMÉ & PRINCÍPE CONST. pt. II, tit. II, art. 24(1); ; SIERRA LEONE CONST. ch. III, art. 22(1); SOMAL. CONST. ch. II, art. 30; SUDAN CONST. pt. II, ch. I, art. 29(1); ; SURIN. CONST. ch. V, art. 17(2); SWED. CONST. ch. 2, art. 6; SWITZ. CONST. tit. II, art. 13(1); TAJ. CONST. ch. 2, art. 23; TOGO CONST. tit. II(1), art. 29; TUNIS. CONST. ch. I, art. 9; UGANDA CONST. ch. 4, art. 27(2)(a),(b); UZB. CONST. pt. 2, ch. 7, art. 27; VIETNAM CONST. ch. V, art. 73; ZAIRE, CONST. tit. II, art. 23.

376. For example, although the United Kingdom lacks a written constitution, its statutory laws offer safeguards to homes. *See* Krotoszynski, *supra* note 29. The United Kingdom Police and Criminal Evidence Act (1984), in Part II entitled "Powers of Entry, Search and Seizure," provides rules for constables to apply for a warrant from a justice of the peace, who will issue the warrant only if a series of conditions is satisfied, including that the justice of the peace "is satisfied that there are reasonable grounds for believing" that a serious arrestable offence has been committed, that material on the specified premises "is likely to be of substantial value" to the investigation of the offence, that the material "is likely to be relevant evidence," and that the evidence does not consist of or include protected or privileged items. 12 HALSBURY'S STATUTES OF ENGLAND AND WALES (4th ed., 1997 Reissue) (Criminal Law), s. 8.

Virtually all constitutions of the world safeguard the right to privacy in the home. Some constitutions generally forbid arbitrary or unlawful entries,³⁷⁷ while others have adopted an "unreasonableness" model based on the Fourth Amendment to the U.S. Constitution.³⁷⁸ Some constitutions require a warrant or other court order or specification for a search.³⁷⁹ Some constitutions spell out procedural requirements for the lawful invasions of privacy, which might be permitted in circumstances and under procedures prescribed by law;³⁸⁰ in the manner, forms, conditions or cases provided or specified by law;³⁸¹ in accordance with law;³⁸² in due course of law;³⁸³ and by virtue of law.³⁸⁴ Some provide for limitations in certain circumstances.³⁸⁵ Some constitutions have

Reissue) (Criminal Law), s. 8.

377. For example, article 29 of the Basic Law of the Hong Kong Administrative Region of the People's Republic of China provides: "The homes and other premises of Hong Kong residents shall be inviolable. Arbitrary or unlawful search of, or intrusion into, a resident's home or other premises shall be prohibited." Basic Law of the Hong Kong Special Administrative Region of the Peoples' Republic of China, Apr. 4, 1990, 29 I.L.M. 1511, 1529.

378. National Constitutions that contain a search and seizure provision modeled on the U.S. Constitution's Fourth Amendment, *see supra* note 106, include the constitutions of Fiji (FIJI CONST. ch. 4, art. 26(1)); Japan (JAPAN CONST. ch. III, art. 35); The Marshall Islands (MARSH. IS. CONST. art. II, §3(1)); and the Philippines (PHIL. CONST. art. III, §2).

379. *See, e.g.*, CAN. CONST. pt. 1, art. 8; CAPE VERDE CONST. pt. II, tit. II, ch. I, art. 40(2)-(3); COSTA RICA CONST. tit. IV, art. 23; CROAT. CONST. III(2), art. 34; CZECH REP. CONST. (1992) ch. 2, pt. 1, art. 12(2); DEN. CONST. pt. VIII, art. 72; ECUADOR CONST., tit. III, ch. 2, art. 23(12); EGYPT CONST. pt. 3, art. 44; EL SAL. CONST. tit. II, ch. I, §1, art. 20; ERI. CONST. ch. II, art. 18(2)(a)-(b); FIJI CONST. ch. 4, art. 26(1); GABON CONST. art. 1(12); GAM. CONST. ch. IV, art. 23(2); GEOR. CONST. ch. 2, art. 20(2); F.R.G. CONST. ch. I, art. 13(2); ICE. CONST. 1944/95 VI, art. 71; JAPAN CONST. ch. III, art. 35; KAZ. CONST. §II, art. 25(1); N. KOREA CONST. ch. 5, art. 79; LAOS CONST. ch. III, art. 29; LIBER. CONST. ch. III, art. 16; LITH. CONST. ch. 2, art. 24; MADAG. CONST. tit. II, art. 13; MARSH. IS. CONST. art. II, §3(1); SPAIN CONST. ch. II, §1, art. 18(2); U.S. CONST. amend. IV.

380. *See, e.g.*, AFG. CONST. ch. 3, art. 44; BAHR. CONST. pt. 3, art. 25; CHILE CONST. ch. III, art. 19(5); CONGO (KINSHASA) CONST. tit. II, art. 24; DJIB. CONST. tit. II, art. 12; ECUADOR CONST., tit. III, ch. 2, art. 23(12); HAITI CONST. tit. III, ch. II, §J, art. 43; LAOS CONST. ch. III, art. 29; LEB. CONST. pt. I, ch. 2, art. 14; OMAN CONST. ch. 3, art. 27; QATAR CONST. (1973) pt. 3, art. 12; RWANDA CONST. tit. II, art. 22; UZB. CONST. pt. 2, ch. 7, art. 27.

381. *See, e.g.*, ALB. CONST. pt. 2, ch. I, art. 37; BENIN CONST. tit. II, art. 20; BURK. FASO CONST. tit. I, art. 6; BURUNDI CONST. tit. III, art. 23; CHAD CONST. tit. II, ch. I, art. 42; COSTA RICA CONST. tit. IV, art. 23; DOM. REP. CONST. tit. II, §I, art. 8(3); GUINEA-BISSAU CONST. TIT. II, art. 38; KAZ. CONST. §II, art. 25(1); MALDIVES CONST. ch. II, art. 18; MALI CONST. tit. I, art. 6; NEPAL CONST. pt. 3, art. 22; NIGER CONST. tit. II, art. 20; SUDAN CONST. pt. II, ch. I, art. 29(2); TOGO CONST. tit. II(1), art. 28; YEMEN CONST. pt. II, art. 51.

382. *See, e.g.*, CAMBODIA CONST. ch. III, art. 40; IRAQ CONST. ch. III, art. 22(c); IR. CONST. art. 40(5).

383. *See, e.g.*, BELR. CONST. §II, art. 29.

384. *See, e.g.*, CAMEROON CONST., Preamble; THAIL. CONST. (1991) ch. III, § 35.

385. For example, some countries expressly provide for limitations of the right to privacy in certain circumstances or for certain purposes, including: defense; public safety; "cases of *flagrante delicto*"; "disaster or rescue"; or for limitations based on public order, public morality and/or public health. *E.g.*, ANT. & BARB. CONST. ch. II, art. 10; BELIZE CONST. pt. II, art. 9(2); BRAZ. CONST. tit. II, ch. I, art. XI; CAPE VERDE CONST. pt. II, tit. II, ch. I, art. 40(2); CENT. AFR. REP. CONST. tit. I, art. 14; DOMINICA CONST. ch. I, art. 7(1); GABON CONST. art. 1(12); F.R.G. CONST. ch. I, art. 13(1); GREN. CONST. ch. I, art. 7(1); ITALY CONST. pt. 1, tit. 1, art. 14; LESOTHO CONST. ch. II, art. 10(1); MACED. CONST. 1991 §II(1), art. 26; MADAG. CONST. tit. II, art. 13; MAURITIUS CONST. ch. II, art. 9(2); NOR. CONST. §B, art. 102; ROM. CONST. tit. II, ch. II, art. 27(2); ST. KITTS & NEVIS CONST. ch. II, art. 9(2); ST. VINCENT CONST. Ch. I § 7(2); SEY. CONST. ch. III, pt. I, art. 20(2)(a); SIERRA LEONE CONST. ch. III, art. 22(2); SOLOM. IS. CONST. ch. II, art. 9(2); SPAIN CONST. ch. II, §1, art. 18(2); TUNIS. CONST. ch. I, art. 9; ZAMBIA CONST. pt. III, arts. 11(d) & 17(2); ZIMB. CONST. ch. III, arts. 11(c) & 17(2).

adopted provisions that mimic the iteration in the European Convention, which permits limitations or restrictions so long as they are justified “in a free and democratic society.”³⁸⁶

From these can be drawn the following general principles in the context of searches and seizures: a respect for the sanctity and inviolability of the home; acceptable limitations on the right, rendering the right not absolute; recognition that any interference with the right must be reasonable and limited to the scope necessary to satisfy a legal purpose; rejection of arbitrary and unlawful interference with privacy and unfettered discretion to search or seize; effective external supervision of law enforcement authorities; balance of prevention and detection of crime versus the right to privacy; call for supervision by judicially independent persons before a search or seizure, and not after; and legally enforceable safeguards regulating use of police powers.³⁸⁷ Unfortunately, a wide gap exists between law and practice with respect to many rights in many countries.

(e) *Conformity of State Practice with International Standards*

Many states that incorporate the right to privacy in their domestic constitutions, general law, or judicial decisions have identified an international standard for the right and attempt to incorporate that into their domestic jurisdictions.

Search and seizure privacy rights can be found in countries of the East, West, North and South, in countries with varying political, economic, and social systems, in countries with widely diverse cultures, and in countries that represent all the major legal systems of the world. Disagreement as to the precise definition of the right does not detract from the argument that the right rises to customary international law.

d. *Opinio Juris*

The second prong of the customary international law test is *opinio juris*, which requires a finding that States that honor the search and seizure privacy right primarily do so out of a sense of legal obligation, and not out of a sense of convenience or coincidence. In determining whether States honor the right due to legal obligation, we consider several factors, including: (a) legality; (b) international versus domestic law; and (c) states’ awareness of the articulation of the legal right.³⁸⁸

“Legality,” as proof of *opinio juris*, requires a finding that the domestic rules protecting the search and seizure privacy right are legal in nature. As the

386. See, e.g., GAM. CONST. ch. IV, art. 23(1); GHANA CONST. ch. 5, art. 18(2); NAMIB. CONST. ch. III, art. 13(1).

387. See generally discussion *supra* at Parts V and VI.

388. See, e.g., JANIS, *supra* note 282, at 55-59.

privacy safeguards are contained in national constitutions, legislation, and judicial opinions, the legality prong is satisfied.

For the "international versus domestic law" prong to be satisfied, the norm in question must concern international rather than domestic law. International human rights law is a subset of international law, and it governs not only the relationship between a state and its citizens, but also it governs the relationship between and among states that are parties to international human rights law treaties. The search and seizure right to privacy is incorporated into both domestic law and international law. Thus, this prong has been satisfied.

The "States' awareness of the articulation of the legal rule" prong is easily satisfied, as every country in the world is a party to at least one international treaty that safeguards the right to privacy. The express consent of those States to be bound by international instruments that contain the right to privacy reflects their awareness of the rules contained therein, including rules regarding the search and seizure right to privacy.

6. *Source of Applicable Law # 6: "General Principles of Law Derived by the Court from National Laws of Legal Systems of the World Including, as Appropriate, the National Laws of States that Would Normally Exercise Jurisdiction over the Crime, Provided that Those Principles Are Not Inconsistent with [the Rome] Statute and with International Law and Internationally Recognized Norms and Standards"—Rome Statute, Article 21(1)(c)*

- a. *"General Principles of Law" under Rome Statute, Article 21(1)(c)*

The Rome Statute drafters were concerned about the appropriateness of the treaty mandating that the Court directly apply national law, a topic that was debated during the pre-Rome Preparatory Committee sessions³⁸⁹ and flatly rejected during the Rome Conference itself.³⁹⁰ However, it was evident to the drafters that the lacuna might need to be filled, as it was impractical, if not impossible, for each applicable rule or principle of law to be enumerated

389. Even in 1995, Ad Hoc Committee delegates had suggested that the 1994 ILC Draft, subparagraph c "should be amended to make it clear that national law was a subsidiary means for determining general principles of law common to the major legal systems or, alternatively, should clearly indicate the relevant national law, the State whose law would apply and the circumstances in which such law would apply, particularly as national law was far from uniform." 1995 *Ad Hoc Committee Report*, *supra* note 74, ¶ 53 ("It was also suggested that a new provision should be added concerning customary law, bearing in mind article 38 of the Statute of the International Court of Justice." *Id.*)

390. The Court is prohibited from ruling on or applying national law. For example, Rome Statute, *supra* note 3, art. 69(8) provides that the Court "shall not rule on the application of the State's national law" when deciding on the relevance or admissibility of evidence collected by a State. However, national law is to be applied, in conjunction with the law of the Rome Statute, in situations involving State compliance for assistance in arrest, extradition or surrender (arts. 89(3)(a) and 107), other forms of State cooperation (arts. 93 and 96), and fines and forfeiture (art. 109). *Id.*, arts. 89(3)(a), 93(1), 96(3), 107(3), 109(1).

in the Rome Statute. Instances would undoubtedly arise in which superior sources of international law contained in the hierarchy would either be silent or would fail to provide a relevant, appropriate law to apply.³⁹¹ The drafters concluded that the Court would turn to national law, but would only glean principles from it without adopting it wholesale. Thus, in Rome Statute, article 21(1)(c), the Court is directed to apply:

[G]eneral principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with [the Rome] Statute and with international law and internationally recognized norms and standards.

General principles of law are substantially non-treaty, non-customary, and non-consensual sources of international law.³⁹² If conventional and customary international law fails to provide an appropriate rule or principle of international law, general principles of law derived from national laws³⁹³ can be used to fill in lacunae. The rationale is that if a common principle exists within the domestic laws of nations, such a principle ought to be attributable to international law to fill in the gap.³⁹⁴

Before canvassing the national legal systems of the world in order to derive an appropriate general principle of law, the Court must parse through the language of the article 21(1)(c) phrase “national laws of legal systems of the world” to determine whether the language is superfluous and inelegant,³⁹⁵ or whether it raises legally cognizable internal distinctions. “Law” (or “national law”) and “legal” (or “legal systems”) are redundant, given that national law or any other sort of law would be associated with a legal system. “National law” and “legal system of the world” are also redundant because any national law or indeed any legal system referred to would necessarily be “of the world.” A streamlined version of this passage that reads “general principles derived from national law” would suggest just that the applicable law is to be derived from national legal systems.³⁹⁶ There would have been no

391. Human Rights Watch has pointed out, as regards international criminal law, that “customary international and treaty law may not be sufficiently developed at the present time to provide legal guidance on all possible matters concerning the application of the [Rome Statute]. General principles, derived from practice in a range of national legal systems, should be drawn upon to fill any potential *lacuna*.” HUMAN RIGHTS WATCH, *supra* note 73.

392. JANIS, *supra* note 282, at 55.

393. General principles of law are rooted in national law, and determined by conducting a comparative analysis. However, some general principles are rooted in “unperfected” international law sources, including treaties and customary international law. An unperfected source of international law would include one that never entered into force, and an unperfected custom might be one in which the state practice element is satisfied but the *opinio juris* element is not. See M. Cherif Bassiouni, *A Functional Approach to “General Principles of International Law”*, 11 MICH J. INT’L L. 768, 768-769 (1990).

394. JANIS, *supra* note 282, at 55-56; see Bassiouni, *supra* note 393, at 774.

395. ASSOCIATION INTERNATIONALE DE DROIT PÉNAL, *supra* note 72, at 36-37.

396. *Id.* It might be argued that “national law” would refer only to the law of States Party to the Rome Statute, and “legal systems of the world” would refer to laws of non-Party States. If that is the meaning intended by the drafters, the inelegant ambiguity is unfortunate.

need to include the term "legal systems" along with the modifier "of the world."

However, another credible denotation exists. "Legal systems" may refer to the five major world systems of law: the French Romanist-Civilist; the Germanic; the Common Law; the Marxist-Socialist; and the Islamic legal systems.³⁹⁷ If so, then the Court would identify which States fit into each of the five world legal systems and canvass national laws from States in those systems.³⁹⁸ The Rome Statute is silent on which nations' laws or how many legal systems the Court shall canvass. An earlier iteration of article 21 suggested that canvassing "the national laws of States representing the major legal systems of the world" was appropriate.³⁹⁹ Even if this language had been adopted it would not have announced precisely which national laws, from which States, representing which legal systems, should be canvassed.⁴⁰⁰

Although the Court must also consider "as appropriate, the national laws of States that would normally exercise jurisdiction over the crime," the Rome Statute does not define these States. However, the ordinary meaning of that phrase suggests the following possibilities: the State of the nationality of accused persons; the State on whose territory the alleged crime took place; the State where the accused person is present; or any State injured by the alleged crime. Furthermore, if the crime is such that universal jurisdiction attaches, all States in the world "would normally exercise jurisdiction over the crime," and thus the States whose laws are canvassed need not be parties to the Rome Statute.

As the Rome Statute is silent on precisely which national laws should be canvassed, the Court itself when faced with a general principle of law determination must ascertain which national laws to canvass. In theory, article 21(1)(c) could require the Court to canvass any one of the following: (i) the national laws of *all* nations in *all* legal systems of the world (which would necessarily include the national laws of all the States that "would normally exercise jurisdiction over the crime"). This would be tantamount to requiring the canvassing of the national laws of all nations because all nations belong to at least one of the major legal systems; (ii) the national laws of only *some* nations in *all* legal systems of the world (which might, or might not, include the national laws of some States that "would normally exercise jurisdiction

397. See DAVID & BRIERLY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW* 21-29 (1985). Note that different scholars categorize the systems differently. See also Bassiouni, *supra* note 249, at 244. Professor Bassiouni comments: "The three primary families are the Romano-Germanic, the Common Law, and the Socialist families. . . . In addition, there is a Muslim, Hindu, and Jewish legal family, a Far Eastern legal family, and a Black African and Malagasy Republic legal family." *Id.* at 244 n.41 (citations omitted).

398. That still would not explain the word "world."

399. See Zutphen Draft Statute, *supra* note 68, art. 14[33][21], proposal 2, para. 2. This provision as proposed in the Zutphen Draft had previously appeared in the *Report of the Preparatory Committee—Proposals*, *supra* note 68, at 106, reprinted in *THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT*, *supra* note 60, at 497.

400. See *id.*, art. 14[33][21] (containing proposals elements of which are incorporated into Rome Statute, art. 21). Arguably, the modifier "major" was omitted so that traditional dispute resolution systems, such as the Rwandan *gachacha* system, could also be used.

over the crime”); (iii) the national laws of only *some* nations in only *some* of the legal systems of the world (which might, or might not, include the national laws of some States that “would normally exercise jurisdiction over the crime”); or (iv) the national laws of *some* States without regard as to whether those States qualify as States that “would normally exercise jurisdiction over the crime.” Since that requirement is precatory, the Court is obliged to consider such states only “as appropriate.”⁴⁰¹

It is unreasonable for the Court to be required to canvass the laws of each of the approximately 190 States of the world. Thus, the Court may consider “as appropriate” a subset, which might consist of the national laws of states that would normally exercise jurisdiction over the crime. The term “as appropriate” is unclear in that no helpful denotation exists.

It may not be unreasonable to require the Court to canvass the national laws of at least one State out of each of the five major legal systems of the world. However, article 21(1)(c) does not call for such quantification. Perhaps the Court, in determining which national laws to consult, will canvass the laws of States that have signed the Rome Statute, or perhaps the laws of States that have adhered to the treaty by ratification or otherwise.

As the appropriate national law to be canvassed will not be known until a particular case arises,⁴⁰² one cannot now know what particular nations’ laws might be canvassed and which “general principles” will be derived in any particular case.⁴⁰³ However, it is clear that since the national laws of states differ, conflicts will arise as to which principle will ultimately be derived and applied. This may become particularly important in debates about the right to privacy in the context of searches and seizures because the definition or scope of the right may differ among nations.⁴⁰⁴

Again, the only express constraint to the derivation of applicable law under article 21(1)(c) is that the law derived must not be inconsistent with “international law and recognized norms and standards.” Article 21(1)(3) does not expressly require the derived general principles of law to be consistent with “internationally recognized human rights” even though the internationally recognized human rights standard applies by operation of

401. It is unclear how large of a subset is mandated—whether, for example, it would suffice if only one set of national laws were canvassed from each major legal system grouping in the world (for a total of about five sets of national laws consulted to determine whether a general principle of law exists). Or, perhaps 10, 20, 50, or 100 sets of national laws must be consulted.

402. The concept of “normally” as regards national laws is necessarily tied to the facts of a particular case. For example, until a case arises, it will not be known the nation of which the accused is a citizen or the nation on whose territory the alleged crimes were committed.

403. The drafters were concerned about uncertainty regarding national laws. For example, “some delegations expressed concern regarding the direct applicability of national law envisaged [in the 1994 ILC Draft Statute] in view of the uncertainty as to which national law should be applied and bearing in mind the divergences in national criminal laws.” Note was taken of the “differences in the criminal law and procedures of common-law and civil-law countries,” and with different delegations choosing one or the other. It was suggested that an attempt be made “to find a generally acceptable and balanced approach, taking into account both types of legal systems.” *1995 Ad Hoc Committee Report*, *supra* note 74, ¶ 88.

404. This is so even though we can arrive at a consistent international theory for the right to privacy in the search and seizure context. See discussion *supra* Parts V and VI.

article 21(3).⁴⁰⁵ However, article 21(1)(c) does require consistency with "international law" (that was defined in article 21(1)(b) as "public international law," which subsumes international human rights law).⁴⁰⁶ Furthermore, the general principles must not be inconsistent with "recognized norms and standards," which arguably is an obtuse phrase, as it does not identify the body of law from which "norms and standards" are to be derived. Nonetheless, it is clear that if the search and seizure privacy right has risen to a general principle of law, then the Court must enforce that right pursuant to article 21(1)(c).

b. *Search and Seizure Privacy Rights as a General Principle of Law under Rome Statute, Article 21(1)(c)*⁴⁰⁷

The search and seizure privacy right may be considered a general principle of law, and if it is, it must be enforced by the Court. Though there is no direct counterpart in the Rome Statute to article 38 of the ICJ Statute, the method for determining general principles under the Rome Statute mimics that employed under the ICJ Statute. Determining the existence of general principles of law involves canvassing the laws of nations, in a comparative law tradition, in a search for common principles. This search is an inductive, empirical analysis that seeks to find repetition of principles as they exist in various states.⁴⁰⁸

For a rule to be recognized as a general principle of law, it must exist "in a number of states," but it need not be universal, exist in all states, or even exist in a majority of states.⁴⁰⁹ No sum certain has been required of any international or national tribunal seeking to identify a general principle of law. To determine whether a general principle exists in a state, it is appropriate to examine the constitutions of relevant states, as well as other aspects of states' internal law.⁴¹⁰ One way to do this is through the inductive method used by Professor Bassiouni in 1993 to confirm the existence of certain international

405. It is curious that the drafters selected the inverse structure of the "consistent with internationally recognized human rights" language, in that the drafters did not require the derived national law to be "consistent with human rights," but required that the law be "not inconsistent" with "international law and recognized norms and standards." It is also interesting that no non-discrimination clause was attached.

406. See *supra* Subsection VI.C.1 (discussion of applicable law).

407. Customary international law and general principles of law, per article 38 of the ICJ Statute, do not have precise counterparts in the Rome Statute. See Arsanjani, *supra* note 70, at 28 (article 38 sources of international law differ from Rome Statute sources of law).

408. See Bassiouni, *supra* note 249, at 239-40.

409. See Bassiouni, *supra* note 393, at 788.

410. Professor Bassiouni states:

"General Principles" have been identified by examining State conduct, policies, practices, and pronouncements at the international level, which may be different from domestic legal principles. Thus, States' foreign policies, bilateral and multilateral treaties, international pronouncements, collective declarations, writings of scholars, international case law, and international customs, even when unperfected, are valid areas of inquiry from which to determine the existence of "principles" within the international context.

Id., at 789.

and domestic human rights norms as “general principles.”⁴¹¹ Professor Bassiouni demonstrated the existence of a wide range of general principles of international human rights through an empirical model of searching for repetition and similarity among various rights. However, his survey did not analyze fully the search and seizure privacy right.⁴¹²

Though a full methodological comparative law analysis is beyond the scope of this Article, the outcome of the above analysis regarding the search and seizure privacy rights as customary international law is probably adequate to show that the right has risen to a general principle.⁴¹³ The existence of the right in the overwhelming majority of States’ constitutions and general laws tends to prove the existence of the right to privacy as a general principle of law.

7. *Source of Applicable Law # 7: “Principles and Rules of Law as Interpreted in Prior Decisions”—Rome Statute, Article 21(2)*

This source of applicable law will perhaps become the easiest source of law to apply as the Court develops a body of jurisprudence. The Court will operate in a manner that blends common law precedent and civil law, as do the ICTY and the ICTR. Because the Court is likely to find the search and seizure right to privacy under the first six sources of applicable law, the right will be incorporated into the Court’s jurisprudence and enforced by the Court pursuant to Rome Statute, article 21(2).

VII. CONCLUSION

This Article calls upon the Preparatory Commission and/or the Assembly of States Parties to reinstate the express search and seizure privacy right and to ensure that the right is safeguarded. Even if those two bodies do not reinstate the express search and seizure privacy right, the right is still likely to be enforced by the Court. Though the drafters excised express reference to the search and seizure privacy right from the Rome Statute, the right is implicit within the Rome Statute and collateral instruments. The right is an “internationally recognized human right,” which the Court, pursuant to article 21(3), must enforce in all its proceedings. All law applied and

411. See generally Bassiouni, *supra* note 249, at 239-40. Professor Bassiouni notes: The rights found in the instruments evidence their international recognition, while their counterparts in the national constitutions evidence national legal recognition. The congruence of both indicate the existence of a “general principle” This study uses a purely empirical model of searching for repetition and similarity among the various rights to prove that similar rights evidence the existence of principles common to international law and national law, and that they are binding “general principles of law.”

412. The general principles that Professor Bassiouni proved that are most relevant to the right to privacy include the right to a fair trial generally, and in particular the right to the inadmissibility of evidence obtained in violation of a person’s right. Only a passing reference is made to the inadmissibility of evidence obtained in violation of a person’s right to be free from unreasonable searches and seizures. *E.g., id.* at 269-70.

413. See *infra* Subsection VI.C.5.

interpreted by the Court must be consistent with the search and seizure right to privacy.

The mere existence of the search and seizure right to privacy is insufficient to ensure realization. The Court must enforce the right, as it is required to enforce all internationally recognized human rights. Moreover, the Court is obligated to consider the article 69(7) exclusionary remedy as a means of helping to ensure that the search and seizure right to privacy is safeguarded.

Enforcement of the search and seizure privacy right will encourage fair police practices, and further the notion that human rights are shared by all, even those suspected of perpetrating heinous crimes. Though the Court will likely find the existence of the search and seizure right to privacy implicit within the Rome Statute and its collateral instruments, the scope of coverage is uncertain, and will be developed by the Court taking into account various factors, possibly including shifting expectations of privacy. The Court might face human rights challenges by those who argue that certain rights, which are not expressly mentioned in the Rome Statute or ancillary instruments, are covered by the treaty. These areas include rights related to the environment, sexuality, gender, and bona fide third parties. These "missing" rights also include certain fair trial rights, and certain rights of suspects, arrestees, and detainees. The Court, in analyzing these challenges, will likely undertake an analysis not unlike that developed in this Article. This Article presents a framework for the Court to use to resolve pressing issues related to missing rights, and a framework for analyzing human rights challenges to the interpretation and application of ICC law.